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Supreme Court, U.S.
FILED

No. 99-___

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In The

OFFICE OF THE CLERK

Supreme Court of the United States

ANN McCLURE, Document Custodian; GARY ROSE, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

Petitioners,

v.

STEPHEN AMELKIN, Broadway Chiropractic; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD, doing business as Bogard & Associates,

AND

CITY OF LOUISVILLE, Division of Police; Jefferson County Kentucky; and Class of all police agencies in the Commonwealth of Kentucky; and LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. MAY KENTUCKY'S LEGISLATURE AMEND A STATUTE, KRS 189.635, TO PROTECT THE PRIVACY OF ACCIDENT VICTIMS BY DENYING ACCESS TO THESE REPORTS EXCEPT TO THE PARTIES INVOLVED IN THE ACCIDENT WITHOUT VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND IN ORDER TO INCORPORATE BY STATUTE WHAT HAS BEEN DECIDED BY KENTUCKY'S APPELLATE COURTS REGARDING PRIVACY, PUBLIC RECORDS, AND KENTUCKY'S OPEN RECORDS ACT AS WELL AS THE FEDERAL *DRIVER'S PRIVACY PROTECTION ACT*?

II. MAY KENTUCKY'S LEGISLATURE CONSTITUTIONALLY AMEND KRS 189.635 BY ADDING A SEPARATE SUBSECTION ALLOWING ACCESS BY NEWS REPORTERS TO REDACTED VERSIONS OF THESE ACCIDENT REPORTS WHILE PRECLUDING NEWS REPORTERS FROM USE OF THESE REPORTS FOR ANY COMMERCIAL PURPOSE?

III. UNLESS THIS ISSUE IS MOOT OR ABSTENTION SHOULD APPLY, MAY KENTUCKY'S OPEN RECORDS ACT PROVIDE FOR A MUCH HIGHER FEE TO BE PAID FOR PUBLIC RECORDS MADE BY THE GOVERNMENT AT TAXPAYER'S EXPENSE WHEN THE REQUEST IS FOR A COMMERCIAL PURPOSE?

THESE QUESTIONS PRESENTED INVOLVE IRRECONCILABLE CONFLICTS IN LOWER FEDERAL AND

QUESTIONS PRESENTED – Continued

STATE APPELLATE DECISIONS REGARDING THE FIRST AMENDMENT VERSUS STATES' OPEN RECORDS LAWS, AS WELL AS, TOUCHING ON LOWER FEDERAL APPELLATE DECISIONS CONCERNING THE FEDERAL DRIVERS' PRIVACY PROTECTION ACT AND THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

THIS UNITED STATES SUPREME COURT HAS ALREADY GRANTED CERTIORARI IN TWO CASES THAT ARE SIMILAR BUT NOT DIRECTLY ON POINT WITH THE QUESTIONS PRESENTED HEREIN DUE TO THE CONFLICTING DECISIONS THROUGHOUT THE UNITED STATES.

SEE:

LOS ANGELES POLICE DEPARTMENT V. UNITED REPORTING PUBLISHING CORP., CERT. GRANTED, 119 S. Ct. 906, 1-25-99, NO. 98-678 – INVOLVES **USE** OF PUBLIC **CRIMINAL** RECORDS **NOT ACCESS**; AND,

RENO V. CONDON, CERT. GRANTED, 67 U.S. L. W. (U.S. MAY 17, 1998) (NO. 98-1464) REGARDING THE DRIVER'S PRIVACY PROTECTION ACT.

LIST OF ALL PARTIES IN THIS PROCEEDING FROM CONSOLIDATION OF THE FOLLOWING CASES BEFORE THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY (LOUISVILLE)

Case No. 1 (and 2 Appeals)

United States District Court
Western District of Kentucky (Louisville)
Civil Docket No. 94-CV-360
(Filed June 6, 1994)

United States Court of Appeals
For the Sixth Circuit
74 F.3d 1240 and 168 F.3d 893

Stephen Amelkin, Broadway Chiropractic,
Dr. Brian Christopher Fee, Chiropractor
Stuart Lyon
Nicholas Baker
David Kaplan
James W. Chambers
Sidney Hanish
Rhoda Daniels
Thomas H. Watson
Kenneth W. Wall
James Bogard d/b/a Bogard and Associates

Plaintiffs

v.

Ann McClure, Document Custodian, Kentucky State Police Post 4 Gary Rose, Commissioner, Department of State Police, Commonwealth of Kentucky (Substituted for Jerry Lovitt)

Defendants

LIST OF ALL PARTIES – Continued

Ben Chandler, Attorney General of the Commonwealth of Kentucky (Substituted for Chris Gorman)

Defendants

Case No. II (and Appeal)

United States District Court
Eastern District of Kentucky (Lexington)
Civil Action No. 94-385
(Filed October 6, 1994)

United States Court of Appeals
for the Sixth Circuit
No. 95-5645

Northern Kentucky Chiropractic,
A Partnership of Joseph Scott and Bryan Johnson, D.C.

Plaintiffs

v.

Steve Ramey, Official Documents Custodian for Lexington-Fayette Urban County Police

Defendant

And

Justice Cabinet, Department of State Police, and Attorney General for the Commonwealth of Kentucky

Intervening Defendants

LIST OF ALL PARTIES – Continued

Case No. III, IV and V

Attorney General's Office
Administrative Open Records Appeals

(Kaplan Appeal) No. 94-ORD-145 (Appeal No. 1142)
(Bogard Appeal) No. 94-ORD-146 (Appeal No. 1195)

(Appealed To)

Franklin Circuit Court
Civil Action No.
95-CI-00020
(filed January 5, 1995)
Frankfort, Kentucky

(Removed to)

United States District Court
Eastern District of Kentucky (Frankfort)
Civil Docket No. 95-CV-4
(Filed January 13, 1995)

(Transferred to)

United States District Court
Western District of Kentucky (Louisville)
Civil Docket No. 95-CV-352
May 1, 1995

LIST OF ALL PARTIES – Continued

Justice Cabinet, Commonwealth of Kentucky and City of Louisville, Division of Police

Plaintiffs
Counter-Defendants

v.

David Kaplan and James Bobard d/b/a Bogard and Associates

Defendants
Counter-Plaintiffs

Case No. VI

United States District Court
Western District of Kentucky (Louisville)
Civil Docket No. 95-CV-22
(Filed January 10, 1995)

Stephen Ameklin, D.C.
Dr. Brian Christopher Fee
Stuart Lyon
Nicholas Baker
David Kaplan
James W. Chambers
Sidney Hanish
Rhoda Daniels
Thomas H. Watson
Kenneth W. Wall
Dr. Mehdi Ghayoumi
James Bogard d/b/a Bogard and Associates

Plaintiffs

v.

LIST OF ALL PARTIES – Continued

Jefferson County, Kentucky
City of Louisville, Kentucky
City of Elizabethtown, Kentucky
Lexington, Kentucky –
Then 2-10-95 order allowing
Class Action of Defendants Consisting of all Police
Or Other Government Agencies Holding
Accident Reports

Defendants

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American Bar Association Journal, Oct. 1998, p. 42 (App. 122)

PETITION FOR A WRIT OF CERTIORARI

The Justice Cabinet, Department of State Police and its Commissioner, as well as, the Attorney General for the Commonwealth of Kentucky respectfully petition as follows for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. Petitioners would also request that this petition be granted to address the remaining question, similar but lacking, in *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, cert. granted, No. 98-678.

OPINIONS BELOW

The United States District Court for the Western District (Louisville) opinions are 936 F. Supp. 427 and 428 and C-94-0360-L(A) (per Allen, J.) rendered August 2, 1994 (Pet. App. 48 & 56) and appellate decision (per Suhrheinrich) by the Sixth Circuit Court of Appeals No. 94-6161, January 9, 1996 at 74 F.3d 1240 (Pet. App. 34); and United States District Court, Western District, (Louisville) 3:94CV-360A, 3:95CV-22-A and 3:95CV-352A (per Allen, J.) rendered June 3, 1996 and June 3, 1996 (Pet. App. 25) and appellate decision by the Sixth Circuit Court of Appeals at 168 F3d 893, Feb. 17, 1999, No. 96-5942, (per Gilman, J., joined by Suhrheinrich, J., with dissent by Siler, J.) pet. for rehearing den. April 30, 1999, (Pet. App. 1 & 71).

Administrative Actions: Appeals to Attorney General and Opinions regarding open records requests:

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See also the collateral case from the United States District Court, Eastern Division (Lexington) No. 94-385, (per Wilhoite, J.) and on appeal to the Sixth Circuit Court of Appeals, No. 95-5645 January 29, 1997 (per Batchelder, J. joined by Guy, J., and Nelson, J.) (Pet. App. 58).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion on February 17, 1999, Rehearing and Suggestion for Rehearing En Banc Denied April 30, 1999, declaring two Kentucky statutes unconstitutional.

This United States Supreme Court is conferred jurisdiction to review the Sixth Circuit opinion on a writ of certiorari by 28 USCA § 1254(1); and possibly the application of 28 USCA § 2403(b). However, after the original action was filed in the U. S. District Court a state agency, as well as, the Attorney General for the Commonwealth of Kentucky were joined as parties to the proceeding and are the petitioners herein, subject to the injunctive relief against them and declaration of unconstitutionality of Kentucky's statutes by the opinion below and sought to be reviewed by this Honorable Court.

CONSTITUTIONAL PROVISIONS, FEDERAL CODE, KENTUCKY REVISED STATUTES, AND ATTORNEY GENERAL OPINIONS

UNITED STATES CONSTITUTIONAL PROVISIONS

Amendment 1: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . , or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Amendment 4: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . shall not be violated. . . .

* * *

Amendment 14: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE
18 USCA § 2721 ET SEQ. – Effective 9-13-94

Subsection 2721. Prohibition on release and use of certain personal information from State motor vehicle records.

(a) In general – Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

Subsection 2725. Definitions

In this chapter. . . .

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

KENTUCKY REVISED STATUTES

KRS 189.635 (Amended by Senate Bill 351-1994)

(1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all

vehicle accidents which occur within the Commonwealth. Such accident reports shall be utilized for such purposes as will improve the traffic safety program in the Commonwealth involving the collection, processing, storing, and dissemination of such data and the establishment of procedures by administrative regulations to insure that uniform definitions, classifications, and other federal requirements are in compliance.

(2) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in fatal or nonfatal personal injury to any person or damage to the vehicle rendering the vehicle inoperable shall be required to immediately notify a law enforcement officer having jurisdiction. In the event the operator fails to notify or is incapable of notifying a law enforcement officer having jurisdiction, such responsibility shall rest with the owner of the vehicle or any occupant of the vehicle at the time of the accident. A law enforcement officer having jurisdiction shall investigate the accident and file a written report of the accident with his law enforcement agency.

(3) Every law enforcement agency whose officers investigate a vehicle accident of which a report must be made as required in this chapter shall file a report of the accident with the Department of State Police within ten (10) days after investigation of the accident upon forms supplied by the department.

(4) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in any property damage exceeding five hundred dollars ($500) in which an investigation is not conducted by a law enforcement officer shall file a written report of the accident with the Department of State Police within ten (10) days of occurrence of the accident upon forms provided by the department.

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he

denies his presence at an accident. *All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.*

(6) *The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.* (Italicized portion represents the 1994 amendments at issue herein).

KRS 187.310 (Transportation Cabinet)

. . . .

(2) . . . . The certified abstract shall not include accident reports filed with the Department of State Police under KRS 189.635,. . . . The cabinet shall not furnish to any person the accident report of a driver other than himself. This section shall in no way preclude the right of any court of law, law enforcement officer, or attorney representing the individual affected from securing full and complete information concerning the record of that individual (first passed as law in 1946).

KRS 189.630 City may require accident reports

Any city may by ordinance require that the operator of a vehicle involved in an accident file with a designated city

department a copy of ***any report*** required by KRS 189.635 to be filed with the department of state police. Such reports ***shall be for the confidential*** use of the city department and subject to the conditions of KRS 189.635. (Last amended in 1976, first passed in 1942). Emphasis added.

KRS 61.871 (1994 amendment)

. . . . to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of these statutes. The General Assembly further recognizes that while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in this chapter, some being exempt under KRS 61.878.

KRS 61.878

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy:

. . . .

(1) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.

KRS 61.940 (1994 Amendment)

(1) Information and information resources residing in the various executive branch agencies of state government are strategic assets belonging to the people of Kentucky that must be managed as valuable state resources:

. . . .

KRS 61.874 (1994 amendment at issue herein)

. . . .

(4)(a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

KRS 61.880

. . . .

(2)(a) If a complaining party wishes the Attorney General to review a public agency's denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection. If the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request. The Attorney General shall review the request and denial and issue within twenty (20) days, excepting Saturdays, Sundays and legal holidays, a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884.

KRS 61.882

(1) The Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public records is maintained shall have jurisdiction to enforce the provisions of KRS 61.870 to 61.884, by injunction or other appropriate order on application of any person.

KRS 304.12-230

It is an unfair claims settlement practice for any person to commit or perform any of the following acts or omissions:

. . . .

(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

. . . .

(13) Failing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(14) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

KRS 304.39-210 Obligor's Duty to Respond to Claims

. . . .

(2) overdue payments bear interest at the rate of twelve percent (12%) per annum, except that if delay was without reasonable foundation the rate of interest shall be eighteen percent (18%) per annum.

KRS 304.39-220 Fees of Claimant's Attorney

(1) If overdue benefits are recovered in an action against the reparation obligor or paid by the reparation obligator after receipt of notice of the attorney's representation, a

reasonable attorney's fee for advising and representing a claimant on a claim or in an action for basic or added reparation benefits may be awarded by the court if the denial or delay was without reasonable foundation.

KENTUCKY OPINIONS OF THE ATTORNEY GENERAL

Kentucky Attorney General Opinion 89-76

. . . .

. . . . The task of separating excepted material from non-excepted material on voluminous numbers of police accident reports is admittedly burdensome. However, the decision to do so rests within the sound discretion of the public agency because the exemptions contained within KRS 61.878(1) are permissive, not mandatory. OAG's 84-163, 83-329, 82-275, 80-519, 79-275. Therefore, the Shively Police Department may make available all information contained on uniform police traffic accident reports or may expunge that information which is exempt from inspection, but may not deny inspection of the entire report.

. . . . Specifically, your letter states that some of the information included on accident reports, such as driver's license numbers which are identical with social security numbers, and names and addresses of parties and witnesses would constitute an invasion of personal privacy if disclosed.

Ky. Op. Atty. Gen. 95-ORD-153 (Pet. App. 116) and see also Ky. Op. Atty. Gen. 95-ORD-151 (Pet. App. 100)

While binding precedent has yet to clearly speak to the point, we believe that the only relevant public interest in disclosure to be considered is the extent to which disclosure

would serve the principle purpose of the Open Records Act. This is the approach the United States Supreme Court has taken in a similar analysis of requests under the Freedom of Information Act (FOIA). *See Dept. of Justice v. Reporters Comm. For Freedom of Press,* 489 U.S. 749, 774-75, 209 S.Ct. 1468, 1482-83, 1032 L.Ed.2d 774, 796-97 (1989). As stated in *Board of Examiners of Psychologist v. Courier-Journal and Louisville Times Co., Ky.,* 826 S.W.2d 324, 327 (1992), [t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good. 826 S.W.2d at 328. At its most basic level, the purpose of disclosure focuses on the citizens right to be informed as to what their government is doing. That purpose is not fostered however by disclosure of information about private citizens that is accumulated in various government files that reveals little or nothing about an agency's own conduct.

Zink at 828, 829. In construing the *Zink* opinion, this office recognized that, "[i]f the nature of the request is unrelated to the fundamental purpose of the Open Records Act, then countervailing interests, such as privacy, must prevail." 95-ORD-151, p. 9. Thus, what may have been implicit in the law before *Zink*, is explicit in the law after *Zink*.

Applying the *Zink* test to the facts before us, we reach the same conclusion. Through counsel, Dr. Campbell acknowledges that his interest in the requested records is a commercial one, to wit, direct mail solicitation. (FNI) Thus, the nature of his request is unrelated to the fundamental purpose of the Act, to expose public agency action to public scrutiny. Having recognized the existence of a cognizable privacy interest in information such as home address, telephone number and social security number in *Zink*, as well as in 95-ORD-151, we find that the privacy interest of pet owners in

Jefferson County in this information outweighs the non-Open Records Act related public interest in disclosure. As the court noted in *Zink*:

> One of our most time-honored rights is the right to be left alone, and we fail to see how an individual who happens to have suffered a work related injury should have that right disturbed merely because of the injury reporting requirements of Chapter 342.

Zink at 829. Extending this reasoning to the present appeal, we see no reason why an individual who has complied with the licensing requirements of Chapter 258, and local ordinances, should have his "right to be left alone" disturbed where there is no articulable public interest in disclosure. Accordingly, we find that the Department of Animal Control properly denied Dr. Campbell's request.

STATEMENT OF THE CASE

Jurisdiction in the Sixth Circuit Court of Appeals

Jurisdiction in the United States Court of Appeals was pursuant to 28 USCA §§ 1291 and 1292(a) as an appeal of an interlocutory preliminary injunctive decision and final injunction and declaratory judgment. The District Court issued a judgment on the merits supposedly disposing of all claims of all parties on June 4, 1996, declaring certain Kentucky laws to be unconstitutional pursuant to the First Amendment to the United States Constitution; and, issued a preliminary and permanent injunction on the merits against these appellants. The judgment further stated "[T]his is an appealable judgment, and there is no just cause for delay". On July 2, 1996 these Petitioners filed their "Joint" Notice of Appeal with the District Court.

I. AMENDMENT OF KRS 189.635

To fully understand the questions presented in this case the procedural and legislative history of pertinent statutes is necessary, not just KRS 189.635 amended in 1994 by Senate

Bill 351 of the Kentucky legislature. As set out above, KRS 187.310 and KRS 189.630, passed in the 1970's, precluded accident reports to be given out and made them confidential. This was also the position that the Kentucky State Police took as the first provision of KRS 189.635 placed the duty on the Justice Cabinet, Department of State Police (KSP) to create, print and distribute the accident report forms to all police agencies in Kentucky, which are to be sent back to the KSP within 10 days for utilization to "improve traffic safety, control dissemination of the report data, and use them to fulfill federal requirements of data collection." See KRS 189.635(1).

In 1989 an Attorney General open records decision involving a Kentucky city police agency stated that the protection of private information in the accident report was a *discretionary* redaction by the police agency when the reports were requested discounting the burden of doing the same for the protection of privacy. See Kentucky General Opinion 89-76 *supra*.

The Kentucky State Police continued its policy of not giving out the reports, as to redact was too burdensome since they investigate thousands of accidents each year.

However, an attorney who wanted these KSP reports to obtain the private information to communicate with potential accident victims filed suit against the KSP Post 11 in London by action in Jefferson County Circuit Court, and the case was settled later without further litigation in 1992 to allow this attorney access. Therefore, the other KSP Posts allowed access as redaction was too burdensome due to the number of attorney, chiropractor, etc. requests and at that time deemed a discretionary redaction even though the Posts received numerous complaints for doing so. Evidence at the hearing below revealed threats of harm and criminal activity from the release of these records.

Even though the Attorney General held the view in its Open Records opinions that the privacy exemption in Kentucky's open record law, KRS 61.878(1)(a), was discretionary, in 1994 Kentucky's Supreme Court rendered two decisions and Kentucky's Court of Appeals one decision that held:

(1) that government records are only to be released when the requestor wants a non-exempt record that reveals the workings of state government;

(2) that certain government records include information concerning individuals whose privacy right would exempt producing such record under Open Records laws, especially when the record shows little or nothing concerning the workings of the government;

(3) that before an individual's information in the government record may be released, the individual has a right to be a party to the action and be heard;

(4) that disclosing private information in government records is *not* discretionary with the agency and privacy being denoted as the first exemption further denotes the legislature's priority in importance of exemption; and

(5) names, addresses, phone numbers, social security numbers, etc. are indeed private information not to be revealed.

See *Kentucky Bd. of Examiners of Psychologists v. Courier-Journal and Louisville Times Co.*, Ky, 826 S.W.2d 324 (1992); *Beckham v. Bd. of Education of Jefferson County, Courier-Journal et al.*, Ky., 873 S.W.2d 575 (1994); and *Zink v. Comm.*, Ky. App., 902 S.W.2d 825 (1994) (dis. rev. den., Ky., 1995). See also 95-ORD-151 and 95-ORD-153 (Pet App. 100, 116).

Therefore, in 1994 KSP managed to get the legislature to amend KRS 189.635 limiting who was to have access to unredacted copies of the accident reports, i.e. the parties, their insurers, and their attorney. The Sixth Circuit was of the opinion that granting access to insurers of the accident victims caused a problem with the 3-prong of the *Hudson* test, directly advancing privacy of accident victims; but, as seen by the statutes above, insurers have to have access to these accident reports to settle these accident report claims

promptly or risk sanctions. KRS 304.12-230; KRS 304.39-210; KRS 304.39-220. *See Central Hudson Gas and Electric Corporation v. Public Service Commission*, 447 U.S. 557 at 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

Therefore, the Sixth Circuit Court of Appeals decision herein is in total conflict with Kentucky's highest court's decisions regarding open records laws for Kentucky and protection of privacy interest.

The legal basis of Kentucky's Appellate Court decision protecting privacy interest cited to Sixth Circuit cases and U.S. Supreme Court cases in their support of their decision.

Therefore, the Sixth Circuit Court of Appeals decision conflicts with its own decisions as well as the decisions of this United States Supreme Court.

In the case of *Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir. 1984), *cert. den.*, 469 U.S. 1034, 105 S.Ct. 506, 83 L.Ed.2d 397 (1984), the Sixth Circuit's decision paralleled, and was cited, in the Kentucky Opinions for denying access to government records containing private information.

Kentucky's Uniform Police Traffic Accident Report Form requires among other things the following information: (1) the person's full name and birthdate; (2) the person's address; (3) the person's driver's license number; which in Kentucky is the person's social security number; (4) the person's physical infirmities which restricts his license; (5) the vehicle's registration and insurance; (6) the vehicle's VIN or ID number; (7) passengers' (even juveniles) names and addresses; (8) witnesses' names and addresses; (9) type of injuries and what medical facilities they were taken to; (10) use of drugs or alcohol; (11) any physical disability that contributed to the accident; (12) photographs of the injured parties or decedent's body, and possibly the autopsy; (13) any criminal violations involved; and, (14) any other information noted such as telephone numbers.

KRS 189.635 as amended *does nothing* to preclude the respondents from soliciting clients in any manner they choose. It apparently inconveniences respondents by not

allowing access to government records that lists names and addresses and other privileged information regarding Kentucky's motorists. Respondents have any number of ways without accessing private government documents to successfully solicit clients through newspapers, radio, television, etc. that other businesses have relied on for decades.

In the case of *Houchins v. KQED, Inc.*, 438 U.S. 1, 57 L.Ed.2d 553, 98 S.Ct. 2588 (1978) the court simply held that *there is no constitutional right by the press or public to access government records.*

In footnoting the Freedom of Information Act as an example, the court *held* it to be *a policy decision for the legislature to determine what government records would be accessed* by the media or public. *Houchins, id.*, at 57 L.Ed.2d 564.

> This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.
>
> *Grosjean v. American Press Co., supra,* and *Mills v. Alabama, supra,* emphasized the importance of informed public opinion and the traditional role of a free press as a source of public information. . . .- neither case intimated that the Constitution *compels* the government to provide the media with information or access to it on demand.
>
> . . . [Nothing] in the Court's holding implied a special privilege of *access* to information as distinguished from a right to public information which has been obtained; [In] *Grosjean*, however, the court did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally.
>
> . . . *The right to speak and publish does not carry with it the unrestrained right to gather information.* 381 U.S. at 16-17, 14 L.Ed.2d 179, 85 S.Ct. 1271 (Emphasis added.)
>
> The right to *receive* ideas and information is not the issue in this case. See, e.g., *Virginia Pharmacy*

> *Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976); . . . The issue is a claimed special privilege of access which the court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish.
>
> . . .
>
> But the choice as to the most effective and appropriate method is a policy decision to be resolved by legislative decision.[7]

The 1989 Supreme Court decision of *Department of Justice v. Reporters Comm.*, held once and for all that any request for government records merely to obtain information about a private individual rather than records to reveal how the agency is working will be deemed an unwarranted invasion of privacy for which disclosure may not be demanded by public or press, under the federal open records laws.

> In sum, *the fact that "an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information."*
>
> . . . . .
>
> Our previous decisions establish that whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request.
>
> . . . .
>
> Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or

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[7] The Freedom of Information Act, 5 USC Subsection 552 (1976 ed) [5 USCS Subsection 552], for example, is the result of legislative decisions.

> information about a private citizen can reasonably be expected to invade the citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." *Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 103 L.Ed.2d 774, 109 S.Ct. 1468 (1989).

The United States Supreme Court in a unanimous decision again in 1994 reaffirmed its 1989 decision in *Dept. of Justice v. Reporters Committee for Freedom of the Press, supra*, by once again holding that disclosure of government records merely to obtain names and addresses to enable contact by the requestor with the persons from the list is an unwarranted invasion of privacy and disclosure of the names and addresses was forbidden in *Department of Defense v. F.L.R.A.*, 510 U.S. 487, 127 L.Ed.2d 325, 114 S.Ct. 1006 (1994).

> An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form. . . . , it is clear that they have some nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure.
>
> . . .
>
> . . . [T]his does not lessen the interest that individuals have in preventing at least some unsolicited, unwanted mail from reaching them at their homes. We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and tradition. *Cf. Rowan v. United States Post Office Dept.*, 397 US 728, 737, 25 L.Ed.2d 736, 90 S.Ct. 1484 (1970); *Olmstead v. United States*, 277 US 438, 478, 72 L.Ed. 944, 48 S.Ct. 564, 66 ALR 376 (1928) (Brandeis, J., dissenting). Moreover when we consider that other

> parties, such as commercial advertisers and solicitors, must have the same access under FOIA as the unions to the employee address lists sought in this case, see *Department of Defense, supra,* at 510 U.S 487, 114 S.Ct. 1006, 127 L.Ed.2d 335-337, it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant.
>
> Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure, we conclude that disclosure would constitute a "clearly unwarranted invasion of personal privacy." *Dept. of Defense v. FLRA, Id.* 127 L.Ed.2d at 331, 334-338, (1994).

United States Sixth Circuit Court of Appeals cases follow these rulings in order to protect privacy interests. In the case of *Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir. 1984), cert. den., 469 U.S. 1034, 105 S.Ct. 506, 83 L.Ed.2d 398 (1984) the Sixth Circuit Court of Appeals upheld a refusal of access to government records to obtain names and addresses of Veterans by a community action group wanting to prevent racial steering as well as to assure veterans were receiving their appropriate benefits because access would have been a clear invasion of privacy under the Freedom of Information Act thereby exempting these records from disclosure.

> " . . . Holding a person's privacy hostage in this fashion is contrary, as the Chief Justice said in *Rowan, supra, to the basic right in* this nation simply to be left alone. Certainly nothing prevents HCC from publicly advertising its investigation and requesting any VA loan recipient who desires to cooperate with HCC to come forward if he so elects, or pursuing other less controversial avenues to obtain the desired information." *Heights Community Congress, id.*, at 732 F.2d 526 at 528 (6th Cir. 1984), *cert. den.*, 469 U.S. 1034, 205 S.Ct. 506, 83 L.Ed.2d 398 (1984).

Citing the Sixth Circuit Court of Appeals case *Heights Community Congress, id.*, and its reasoning the Ninth Circuit in *Painting Ind. of Hawaii v. Dept. of Air Force*, 26 F.3d 1479 (9th Cir. 1994) denied access to government records to labor organizations seeking to enforce wage standards for government employees. *See also* the case of *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488 (1st Cir. 1992).

Right of Privacy interests sanctioned under Open Records laws have also been supported by other Courts in other circuits to uphold the government's refusal from divulging the following types of information pursuant to Open Records Requests:

(1) medical information concerning drug or alcohol use, *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986);

(2) persons' names and social security numbers as they correlate to particular addresses, *Yeager v. Hackensack Water Co.*, 615 F.Supp. 1087 (D.C.N.J. 1985);

(3) names and addresses of union members eligible to vote, *Reed v. N.L.R.B.*, 927 F.2d 1249 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1047, 112 S.Ct. 912, 116 L.Ed.2d 812 (1992);

(4) names and addresses of Connecticut residents who were members of the U.S. Railroad Retirement Fund sought by an attorney to enable the attorney to send them an informational pamphlet of their rights under the Federal Employers Liability Act and to solicit business from them, *Dipersia v. U.S. R. R. Retirement Bd.*, 638 F.Supp. 485 (D. Conn. 1986). The Court upheld the government's protection of this list from the solicitous attorney.

(5) names and address of retired Federal employees as requested by the National Association of Retired Federal Employees to enable new recruits into its membership, *NARFE v. Horner*, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990), wherein the court held:

> " . . . .[N]o one would request simply all "names and addresses" in an agency's files, because without more, those data would not be informative. The

> extent of any invasion of privacy that release of the list might occasion thus depends upon the nature of the defining characteristics, i.e., whether it is significant that an individual possesses them.
>
> . . . .
>
> . . . [D]isclosure of the information requested here would interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes. . . . Any business or fund-raising organization for which such individuals might be an attractive market could get from the Government, at nominal cost, a list of prime sales prospects to solicit. Armed with this information, interested businesses, charities, and individuals could, and undoubtedly would, subject the listed annuitants "to an unwanted barrage of mailings and personal solicitations." *Minnis*, 737 F.2d at 787. In light of the Supreme Court's affirmation, in a different context, that "[t]he ancient concept that 'a man's home is his castle into which not even the king may enter' has lost none of its vitality . . . ," such a fusillade cannot readily be deemed a *de minimis* assault on the privacy of those within. *Nat'l Ass'n of Retired Federal Emp. v. Horner, id.*

It is self-evident that the foregoing information is deemed private information by most people of normal sensibilities. In fact, most of the foregoing information is deemed confidential information pursuant to federal and state law, for example, social security numbers, juveniles' criminal behavior, handicaps, alcohol or drug addictions, etc. Frequently "at scene" photographs include the unconscious, dead or injured victims in embarrassing positions or with little or no clothing. Besides the obvious privacy invasions, the foregoing information could also be readily used for criminal reasons to impersonate the victim's identification, or to steal vehicle VIN numbers for "chop shops" or to acquire unlisted residential addresses or telephone numbers, i.e., by stalkers, etc.

(Evidence of such criminal actions was presented to the trial court).

All Kentucky's legislature has done by amending KRS 189.635 is *to assure* the *confidentiality* of this personal information, in line with Federal and state decisions upholding exemption of such information from access to the public in general.

It is beyond dispute, that individuals have a right of privacy stemming from constitutional law, common law, and statutory law which must be protected by the government rather than invaded. *Katz v. U.S.*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

The Kentucky State Police is an agency to uphold the laws of Kentucky and *protect* the public, and *not* jeopardize their safety or privacy by being a main link in a chain to such an invasion or privacy.

Therefore, exemptions from Kentucky's Open Records Law requirements which incorporates KRS 189.635 to protect an individual's privacy rights is a lawful and rational means to afford protection of privacy which is a substantial governmental interest fully recognized by the Federal judiciary. Statutes similar to Kentucky's statute at issue, KRS 189.635, have also been upheld even using the stricter First Amendment tests by state and Federal courts. See *DeSalvo v. State*, La., 624 So.2d 897 (1993), *cert. den.*, 114 S.Ct. 1067, ___ U.S. ___, 127 L.Ed.2d 386 (Feb. 1994).

Since *KRS 189.635* is *not* a regulation of speech *but* a regulation *of access* to government records *to protect privacy interest*, Petitioners submit the most stringent review applied by the lower court would pass the *Hudson* four part test as well as the more appropriate test of being "rationally related to a legitimate state purpose." It can hardly be argued to the contrary that limiting access to state government records in the nature of accident reports is going to directly *further* the legitimate and substantial purpose of protecting private information therein and therefore protecting accident victim's constitutional and statutory right of privacy in a material way.

Another similar case involving government judicial records and the right of privacy vs. the right of access and freedom of commercial speech is *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), *cert. den.*, 513 U.S.

1044, 115 S.Ct. 638, 130 L.Ed.2d 544 (1994). In upholding the constitutionality of the statute, the court noted that *Shapero v. Kentucky Bar Ass'n* merely *protects the right to solicit with information already in the possession of the solicitor, and held that indeed a privacy invation does occur when the solicitor tries to discover the recipient's legal affairs.*

In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988), the Supreme Court . . . . said that "[t]he [privacy] *invasion*, if any, *occurs when* the lawyer *discovers* the recipient's legal affairs, *not when* he *confronts* the recipient with discovery." *Id.* The case at issue involves just that sort of invasion. *Lanphere & Urbaniak v. Colorado, supra*, at 21 F.3d 1514 (10th Cir. 1994), *cert. den.*, 115 S.Ct. 638, 130 L.Ed.2d 544 (1994).

While the respondents all along have argued that cases from other circuits should apply to the case at bar, those other United States Court of Appeals have *not* dealt with a *civil* statute denying *access* but have dealt with statutes, civil and criminal, *allowing public access but* directly *prohibiting commercial* use/speech/solicitation *after accessing* these records. *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993), *rev. Morales*, 63 F.3d 358 (5th Cir. 1995), *cert. den.*, 116 S.Ct. 917 (1995); *Moore v. Morales*, 843 F.Supp. 1124 (S.D. Tex. 1993); *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994); and, *Los Angeles Police Department v. United Reporting Publishing Corp.*, 146 F.3d 1133 (9th Cir. 1998), *cert. granted*, 119 S.Ct., 901, 142 L.Ed.2d 901, ___ U.S. ___ (Jan. 25, 1999).

What the Circuit Court of Appeals in this case has done is deny the Kentucky legislators the ability to pass rational access laws under the Open Records Act; and, has caused a conflict between its decision and Kentucky's Appellate Courts interpreting Kentucky's Open Records laws regarding privacy. Even though the Circuit Court of Appeals strikes this statute it cannot order to be done, what cannot be done by Kentucky law and decisions.

In addition to the foregoing Federal and state case law that allows for denying access to government records based

upon privacy concerns, recent federal law also shows a concern by Congress of privacy for the citizens of the United States.

Congress passed the *Driver's Privacy Protection Act* effective, September 13, 1997, which requires states to provide a mechanism to preserve the privacy of names and addresses in state agencies having motor vehicle records. This Federal Code also allows states to pass even more restrictive laws if it so desires. See *supra*, 18 USCA §§ 2721 et seq. and (Pet. App. 74).

This particular code is hotly contested under the Tenth Amendment by the various United States Court of Appeals and this Court has also chosen to grant certiorari to settle the conflicting decisions. See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1753, ___ L.Ed.2d ___, ___ U.S. ___ (May 17, 1999).

For the foregoing reasons, Petitioners request this writ for protection of privacy rights not previously represented herein, to settle conflicting decisions in the different circuits, and under the Tenth Amendment preserve the right of Kentucky's legislature to pass laws to protect privacy rights.

II. The United States District Court and Court of Appeals for the Sixth Circuit Struck The Provisions (5) and (6) of KRS 189.635 As Unconstitutional and Unserverable Because KRS 189.635(6) Allowed Access to News Gathering Sources Concerning Traffic Or Wrecks and Therefore Undermined the Substantial Privacy Interest. (Pet App. 1).

Even the Sixth Circuit Appellate decision below recognized a public interest in knowledge of accidents:

> Given the clear public interest in having a general awareness of accidents taking place within the community, we believe "it is apparent that the general assembly would not have enacted the remaining parts without the unconstitutional part." Ky. Rev. Stat. Section 446.090. Because retaining Section 189.635(5) alone would be contrary to the legislature's intent in passing the amendments to Section

> 189.635(5)(6), we find that the one cannot be severed from the other. Accordingly, Section 189.635(5), given its inextricable links to Section 189.635(6), must also fall. *Amelkin*, *supra*, 168 F.3d 893, (6th Cir. Ky., February 17, 1999 reh. den. April 30, 1999).

The Sixth Circuit Appellate Court also completely ignored the Kentucky Supreme Court decisions, *supra*, that specifically held that redaction of personal information is *mandatory* and would have to occur under KRS 189.635(6) before release to the press. This statute is incorporated into Kentucky's Open Records Act at KRS 61.878(1)(j) (Pet. App. 94). They also simply ignored the clear evidence from the KSP Commissioner that redaction is also the policy under the Open Records Act and with the KSP.

Therefore the Sixth Circuit is mandating that the KSP release records which it cannot do lawfully under Kentucky's Open Records Act or by Kentucky's highest appellate court's decision.

The Sixth Circuit is ignoring its own case law, *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, (6th Cir. 1984), *cert. den.*, 469 U.S. 1034, 205 S.Ct. 506, 83 L.Ed.2d 398 (1984) by ordering this unredacted release of accident reports by the KSP to the Respondents.

Besides the administrative burden shown to the trial court, the Sixth Circuit decision mandates KSP to violate other statutes not at issue (KRS 187.310 and the *Federal Driver's Privacy Protection Act*), as well as Administrative Opinions from Open Records appeals to the Attorney General pursuant to the statutory process to appeal.

The court also disregarded the proof at the hearing that three of Kentucky's major newspapers for a period of two weeks published articles about wrecks but mentioned *no* private information. This is probably the reason the *Lanphere* case held that access to the media does not undermine the state's substantial interest in privacy of its records.

> " . . . if releasing this accident report information to the press destroyed all privacy for the information contained herein, then why would the Plaintiffs be in Federal court seeking an injunction to obtain the very same information if it was so pervasively known to all." *Lanphere & Urbaniak*, 21 F.3d 1508 (10th Cir. 1994), *cert. den.*, 115 S. Ct. 638 (1994).

This United States Supreme Court has also ruled that favoring the press is a justified legislative action taken.

> . . . Neither the First Amendment nor the Fourteenth Amendment mandates a right to access to government information or sources of information within the government's control. Under our holdings in *Pell v. Procunier, supra*, and *Saxbe v. Washington Post, supra, until the political branches decree otherwise, as they are free to do, the media have no special right of access* . . . different from or greater than that accorded the public generally. *Houchins v. KQED, Inc., id.* at 57 L.Ed.2d 561-565. (emphasis added).

Even in *Florida Bar*, the United States Supreme Court in upholding the laws at issue mentioned that the newspaper had access prior to the 30 day waiting period at issue therein. *Florida Bar v. Went for It, Inc.*, 515 U.S. ___, 132 L.Ed.2d 541, 115 S. Ct. 2371 (June 1996).

See also *Department Of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 103 L.Ed.2d 774, 109 S.Ct. 1468 (1989); and *Dept. of Defense v. F.L.R.A.*, 510 U.S. ___, 127 L.Ed.2d 325, 114 S.Ct. 1006 (1994).

Citing United States Supreme Court cases in *Federal Election Com'n v. Political Contributions Data, Inc.*, 753 F.Supp. 1122 (S.D.N.Y. 1990), *rev. on other grounds*, 943 F.2d 190 (2nd Cir. 1991), the Federal Court struck down Plaintiff's First Amendment and equal protection argument and stated there was a major difference in the constitutional sense in the "media" and mere "information gathers". Distinguishing the differences in protection offered the traditional

news organizations in contrast to commercial speech, the court upheld the constitutionality of favoritism for news media to access information in contrast to the denial to information gatherers of access to records for commercial purposes, solicitation etc.

> . . . There is no call to read the decision as either generally forbidding, or even requiring strict scrutiny for laws that single out the press for favorable treatment. Thus, neither *Austin* nor *Minneapolis Star* requires strict scrutiny of the news gathering exemption here. . . . The court said that while "the press's unique societal role may not entitle the press to greater protection under the constitution" it did provide a compelling reason for an exemption. 110 S.Ct. at 1402. *The case may be read as manifesting a strong readiness to allow differentials favoring the press*, . . . *Walsh v. Brady*, 925 F.2d 1229 (D.C. Cir. 1991). (emphasis added).
>
> Implicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but *are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 74 L.Ed.2d 794, 103 S.Ct. 948 (1983). (emphasis added).

For the foregoing reasons, the Sixth Circuit decision does not comply with its own decisions or this United States Supreme Court decisions. Even under the more strict *Hudson* test, the statute is constitutionally valid; Petitioners have asserted a substantial government interest in privacy, and unwillingness to assist invasion of privacy or criminal activity from access to government records.

III. The United States District Court, Louisville Division, ruled that the fee issue for commercial users of government records was a state issue (Petitioners also submit this holding under the Tenth Amendment).

Respondent, attorneys, and chiropractors, allege that the fee is imposed for the privilege of their exercise of their First Amendment commercial speech rights, as well as a tax for access to government records. The lower court found the remaining Respondent, James Bogard, to be merely a database gatherer and seller, i.e. commercial speech and not a newspaper.

Under the statutes at issue, if the court rules KRS 189.635(5) and (6) unconstitutional *no one has access* to accident reports except under the provisions of the Open Records Act.

Under the Open Records Act, no one has access to private information i.e. addresses, social security numbers, etc. contained in these reports. Therefore, Respondents are no better off whether these statutes exist or not. This also means that their contention of the unconstitutionality of the fee provision for commercial users under the Open Records Act is a *non-issue* for them.

Addressing their contentions anyway, the federal Freedom of Information Act for years has authorized higher fees for government records requested for commercial use. Newspapers have no charge. See 5 USCA § 552(2)(4)(A)(ii)(I) and 5 USCA § 552(a)(4)(A)(iii). To this writer's knowledge there is *no* federal case attacking this structured fee arrangement as unconstitutional or even challenged, while there are cases that support this reference to journalists.

In *Greater New Orleans Broadcasting Ass'n, Inc., et al. v. United States et al.*, No. 98-387, decided June 14, 1999, *BNA* (Vol. 65 No. 11 at 336), this United States Supreme Court held that the overall rationality of the governmental

scheme affecting commercial speech must be evaluated. Individual lines drawn must bear a meaningful relationship to the particular interest asserted by the government without so many piercing exceptions as to destroy the interest asserted. The Petitioners have complied herein with this court's edict.

The statutes at issue are *not* statutes which tell the accessors how to use the reports or whether to use them at all, but are available to only a very few for rational public and private interests.

> . . . For present purposes, the question may be defined as whether plaintiff has documented his request in such a fashion that the public should pay for the search that will follow. In simple terms, the public should not foot the bill unless it will be the primary beneficiary of the search.[1]

The higher fee for government records "lies solely within agency discretion" and government records *made at taxpayer expense should allow different treatment of requests for private profit even if the request for access disadvantages First Amendment uses. Burris, id.* (emphasis added).

> [T]he State, no less than a private owner of property has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, at 129-130, 69 L.Ed.2d 517, 101 S.Ct. 2676; *Greer v. Spock*, 424 U.S. 828, 836, 47 L.Ed.2d 505, 96 S.Ct. 1211 (1976); *Adderley v. Florida*, 385 U.S. 39, 48, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966).
>
> This type of selective access does not transform government property into a public forum. *Perry Ed.*

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[1] A Department of Justice Memorandum dated December 18, 1980, in setting forth interim guidelines under 5 U.S.C. Section 552(a)(4)(A) stated this idea by emphasizing "the general need to exercise proper control over the use by an agency of valuable staff services that constitute resources provided by the taxpayers – resources that might otherwise be conserved, or used for other federal work." *Burris v. C.I.A.*, 524 F.Supp. 448 (M.D. Tenn. 1981).

Assn. v. Perry Local Ed. Assn., 460 U.S., 74 L.Ed.2d 794, 103 S.Ct. 948 (1983)

Walsh v. Brady, 927 F.2d 1229 (D.C. Cir. 1991) was another case that upheld the favorable treatment of the news gathering organizations as opposed to a First Amendment freedom of political expression argument for equal treatment.

> The challenged regulations contain an exemption for news gathering, providing a general license for travel-related payments for "persons who are traveling for the purpose of gathering news making news or documentary films, engaging in professional research, or for similar activities" . . . *Walsh, id.*

In discussing the FOIA fee statute, the United States Supreme Court noted the fee provisions were included to "reduce the burdens imposed on the agencies" as identified and set forth by Congress. The court also noted that if the duty to search and retrieve records included legal efforts, then the agency could assess the private requestor costs of the litigation. *Kissinger v. Reporters Committee*, 445 U.S. 136, 63 L.Ed.2d 267 at 283-284, 100 S.Ct. 960 (1980).

In justifying the preferential fee treatment of news media over commercial entities requesting records, the District of Columbia United States Court of Appeals noted a case wherein it had approved an $8,000.00 fee and explained:

> The legislative history of the FOIA fee waiver provision indicates "a special solicitude for journalists." *Griffin*, 811 F.2d at 649. This special treatment stems from the notion that furnishing journalist with information will benefit primarily the public. *Larson v. C.I.A.*, 843 F.2d 1481 (D.C. Cir. 1988).

Distinguishing the differences in protection offered the traditional news organizations in contrast to commercial speech, the court upheld the constitutionality of favoritism for news media to access information *(which also precluded the media from re-release for commercial purposes)* in contrast to the denial all together to information gatherers of access to

records for commercial purposes, solicitation etc. The Court struck down the First Amendment and Equal Protection Claims.

> The provision at issue imposes fewer restrictions on the expression of traditional media businesses than on certain other businesses, namely, *PCD's reporting-selling operation*. This distinction, however, is justified by a compelling governmental interest in assuring that the disclosure purposes of the Act are not frustrated by the protective device of Section 438(a)(4). *Federal Election Com'n v. Political Contributions Data, Inc.*, 753 F. Supp. 1122 (S.D.N.Y. 1990), *rev. on other grounds*, 943 F.2d 190 (2nd Cir. 1991).

Case law clearly establishes that the public does not have an unrestricted right of access to U.S. Government records and the requestor or need is *not* important. *Durham v. U.S. Dept. of Justice*, 829 F.Supp. 428, 433 (D.D.C. 1993) (reduced fees for indigent prisoner's inspection of records to further attack his criminal conviction not warranted); "goal of FOIA is to permit the public to scrutinize the activities of government; it is not intended to foster the dissemination of information gathered by the government about private citizens for the use of other citizens"; *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991) (A person's "need" for agency documents neither diminishes nor enhances one's rights under FOIA).

Requesting to inspect and copy public records for a commercial purpose by payment of a fee, which is higher than the fee required for persons seeking inspection for a noncommercial purpose, is not a prior restraint and the fee provisions of KRS 61.874 are constitutional. Before respondents could prevail on their "novel" theory that the statute authorizing higher fees for inspection of public records for a commercial purpose is facially invalid or otherwise because it constitutes an unconstitutional tax on their exercise of First Amendment

rights, Respondents must show that the fee provisions of KRS 61.874 constitute a "prior restraint." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). A "prior restraint" *forbids* certain communications when issued in advance of the time that such communications are to occur. *Alexander v. U.S.*, 509 U.S. 544, 550, 113 S.Ct. 2766, 2771, 125 L.Ed.2d 441, 451 (1993) (emphasis in original). Kentucky's open record fee provisions are merely a charge for the cost of the product, i.e., creation and reproduction of the record, not an administrative order forbidding communications, *supra.*

The fee provisions of *Alexander v. U.S.* were simply laws to access public records for fees, as are Kentucky's fees, not laws regulating a "license to speak."

Respondents cannot show that the Petitioner state agency has "unbridled" discretion without standards to "allow courts to quickly and easily determine whether the licensor is discriminating against disfavored speech." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. at 758, 108 S.Ct. at 2144, 100 L.Ed.2d at 783. KRS 61.874 establishes numerous guidelines for setting the fee for records. KRS 61.870, et seq., provides for an appeal to the Office of Attorney General, Circuit Court, Court of Appeals of Kentucky, and the Supreme Court if Respondents question the fee provision. KRS 61.880 and KRS 61.882. Respondents cannot possibly prove a lack of standards or insufficient review of the Petitioners' fee decisions. Therefore, the question regarding fees be moot.

The significance found in the section (6) amendment to KRS 189.635 to the effect that "the news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report" is due to the fact that Kentucky's open records laws (KRS 61.870 et seq.) were also

drastically amended in 1994 to allow all agencies to charge more for *non-exempt* government records if requested for any type of *commercial purpose*. See KRS 61.874 and KRS 61.875 and the complete Open Records laws and amendments at Pet. App. 84.

The agencies of Kentucky state government have a compelling interest, on behalf of its taxpayers, to recover a reasonable fee for complying with an open records request from a person with a commercial purpose . . . In other words, taxpayers should not have to subsidize the cost of government agencies complying with open record requests from persons seeking those records for a commercial purpose as opposed to persons seeking inspection to (a) check against government corruption or misfeasance and (b) to hold governors accountable to the governed.

This Court should determine that Respondents' constitutional rights of commercial speech are minimally infringed by the state's imposition of a higher fee for accessing public records when the requestor has a commercial purpose. This Court should apply a "rational basis" review because no "protected class" or "suspect class" has been alleged to have been affected, much less proven to have had their speech silenced by the government by plaintiffs. *Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995). Kentucky state government clearly has legitimate and strong interests in requiring persons to fully compensate government agencies when requesting to inspect and copy public records for a commercial purpose. This payment of a fee, which is higher than the fee required for persons seeking inspection for a noncommercial purpose, poses little or no burden on plaintiffs' exercise of commercial speech. Obviously the Respondents would not be making such a major controversy about this statute unless great amounts of money are involved for the Respondents at

Kentucky's taxpayers, expense. The fee provisions of KRS 61.874 are constitutional and not a prior restraint.

ARGUMENT OF REASONS FOR GRANTING THE WRIT REQUESTED

I. **There are numerous compelling reasons for granting the requested Writ of Certiorari. First this was an *access* case *to* civil government *records* for which the *United States Sixth Circuit ignored it own case law*, case law of most circuits in the United States, *as well as numerous cases of this United States Supreme Court.***

II. **Secondly, the U.S. Court of Appeals decision mandates that KSP violate Kentucky's Open Records laws and appellate decisions and be party to violating citizen's privacy rights at taxpayer expense. By sending the case back down for a fee hearing is erroneous as (1) the issue is moot and (2) it is an issue for Kentucky's courts to decide upon its own laws. *MacDonald v. Village of Northport, Mich.*, 164 F.3d 964 (Mich. 1999).**

III. **This Court should settle what test is to be utilized when mere *access* to *civil* records are denied totally or partially versus when the *Hudson* test is utilized.**

If this Court concludes that Respondents have standing and the government has imposed a small burden (payment of a fee) on Respondents before allowing access to government records needed for their exercise of constitutional rights, or for denying in total access, Petitioners assert that Kentucky state government merely had to show a rational basis to the means for doing so.

The General Assembly has declared that public agencies are required to manage and maintain their records according to the requirements of KRS 61.870, et seq., and other statutes "to ensure the efficient administration of government and to provide accountability of government activities . . . " KRS 61.871. The General Assembly has further found that "while

all government agency records are public records for the purpose of their management, not all these records are required to be open to public access . . . some being exempt under KRS 61.878." KRS 61.871.

The agencies of Kentucky state government have an obvious interest in the efficient administration of government, including the efficient management of public records, without burdensome requests, which disrupt the government's daily business activities, from persons seeking to inspect and copy records for commercial purposes. KRS 61.871. The agencies of Kentucky state government have an obvious interest in protecting the "personal privacy" of individuals (especially names and home addresses) from being compelled to be provided by law enforcement authorities because the individual was involved in an automobile accident.

IV. The Respondents argued that this was a case of prior restraint to which *Speer v. Miller* and *Innovative Data Systems v. Morales* applied.

These cases are somewhat different to the case at bar as they dealt with a *direct ban on commercial speech* by the wording of the statute. *Nothing in KRS 189.635 even hints at a ban* on mail solicitation, or any other form of speech activity. *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994); the dissent in *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508 (10th Cir. 1994), *cert. den.*, 115 S.Ct. (1994); and *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993), *rev., Morales*, 63 F.3d 358 (5th Cir. 1995), *cert. den.*, 116 S.Ct. 917.

A closer look at *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994) after remand and cited by the lower court (erroneously) in support of its opinion, shows that the court in *Speer* supports the Petitioners' position as it distinguished a pure denial of access statute which would be legal from an access statute with unconstitutional conditions placed on the

use of this accessed material by restricting speech related purposes.

Some of these cases also involved criminal records and the use put to them if access was achieved. Again the exceptions in these cases caused a great hole in the substantial state interest asserted. Furthermore, these cases, therefore, involved *direct verbal prior restraints*.

KRS 189.635 is not a statute that addresses access to criminal trials or records which for over 200 years have had constitutional protection of some kind for access to the proceedings. *J. B. Picture, Inc. v. Dept. of Defense*, 86 F.3rd 236 (D.C. Cir. 1996). Nor is a new restriction on access different from a former access unconstitutional or automatically suspect. A denial of access is not equivalent to a denial to speak. *J. B. Pictures Inc.*, *id.*, at 240-241.

V. The issue of the constitutionality of the statutory fee provisions authorizing higher fees for persons requesting inspection of public records for commercial purposes is one of first impression for this court and apparently every state and federal court in this country. However, there have been cases which have tangentially addressed this issue and ruled there is no unrestricted access to public records.

The Supreme Court has recognized on three separate occasions that there is no constitutional right to access government records or sources of information even when access is necessary to exercise the First Amendment right of (commercial or press) speech. *Depart. Of Defense v. F.L.R.A.*, 510 U.S. 487 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994) (upholding agency's denial of union's request for home addresses of agency's employees represented by the union).

The First Amendment expressive rights and equal protection rights are not violated by failure to provide "free rides" or failure to subsidize Records Requestors' access, if valid, to

government made records made at great expense by the taxpayers, accessed for the Requestor's commercial purposes of any nature with potentially great monetary gains at taypayer's expense. *Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997). The lower court completely failed to address by findings and conclusions the issues necessary to grant the declaratory and injunctive relief regarding the harm to the privacy of those involved in accidents in Kentucky. *Justice v. Reporters Committee*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (upholding agency's denial of request for person's "rap sheet"); *Houchins v. KQED, Inc.*, 438 U.S. 1, 15, 98 S.Ct. 2588, 2597, 57 L.Ed.2d 553, 565 (1978) (neither "the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.")

The above three Supreme Court decisions may explain the complete absence of *any* published decisions challenging the constitutionality of laws charging fees for accessing public records or even larger fees for commercial uses. The Supreme Court has definitely held that there is no constitutional right of access to government records or information. The Respondents in this case have sought to avoid raising what most persons would consider to be a settled question (whether there is a constitutional right to access public records) by erroneously construing their case as one involving a tax on their right to engage in commercial speech. As explained above, a fee charged for accessing public records is not a tax on commercial speech. KRS 189.635 denies access not only to the commercial speaker but the public at large.

VI. The last very significant reason for granting review is due to the splits in the different United States Court of Appeals regarding access and use of government records versus privacy rights and the Driver's Privacy Protection Act. There are also many state appellate decisions that also conflict on these issues. Though this court has granted certiorari to settle these differences (open records) in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 146 F.3d 1133, *cert. granted,* 119 S.Ct. 901, 142 L.Ed.2d 901, ___ U.S. ___ (January 25, 1999); and, *Driver's Privacy Protection Act* in *Condon v. Reno*, 155 F.3d 453, *cert. granted,* 119 S.Ct. 1753, 143 L.Ed.2d 786, ___ U.S. ___, May 17, 1999, the case at bar would provide for the final important questions to be resolved:

(1) is there a constitutional right to *access* government records;

(2) may a distinction of access be made for access by parties involved in the accident and news media; and,

(3) may government charge graduated and higher costs to obtain open records if they are for a commercial purpose or purpose other than "to know what the government is up to."

CONCLUSION

This case involves a statute implemented pursuant to Kentucky Open Records Laws aimed at protecting privacy and precluding access to these records for any purpose. The United States Supreme Court has ruled that this is a legislative matter. The balance struck by KRS 189.635 is identical to the judicial balance struck by the United States Supreme Court and most all of the other circuits addressing right of access to government records when privacy invasions are at risk. Neither the identity of the requestor, nor the purpose (commercial speech or otherwise) for the request to access

government property/records is important when weighed against privacy concerns protected by the open records laws. Identity, need, or purpose does not cause the Open Records Law to suddenly become suspect and tested under more rigorous First Amendment tests. KRS 189.635 does not even mention the word solicitation directly or indirectly, much less direct that any kind of speech may or may not be engaged in. What it does mention is privacy and confidentiality concerns for accident victims' reports in line with recent Federal legislation and older federal case law, Kentucky appellate case decisions, and United States Supreme Court decisions sanctifying the right of the legislature to protect "personal information" and privacy rights of its citizens.

For the reasons stated herein, the Petitioners herein request this Honorable Court to grant this Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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City of Louisville, Division of Police, Plaintiff,

v.

Ann McCLURE, Document Custodian; Gary Rose, Commissioner of Department of State Police; Ben Chandler, Attorney General, Defendants-Appellants, Justice Cabinet, Department of State Police, Plaintiff/ Counter Defendant-Appellant,
Jefferson County, Kentucky, Defendant.

No. 96-5942.

United States Court of Appeals,
Sixth Circuit.

Argued April 24, 1998.

Decided Feb. 17, 1999.
Rehearing and Suggestion for Rehearing En Banc Denied April 30, 1999.

Mary J. Lintner (briefed), Donald L. Cox (argued), Lynch, Cox, Gilman & Mahan, Louisville, KY, for Plaintiffs-Appellees.

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Steve Durham, Office of the General Counsel, Corrections Cabinet, William B. Pettus, Asst. Atty. Gen. (argued and briefed), Office of the Attorney General, Civil &

Environmental Law Division, Frankfort, KY, for Defendant-Appellant Ann McClure and Ben Chandler.

Steve Durham, Office of the General Counsel, Corrections Cabinet, Lucy B. Richardson (argued and briefed), Commonwealth of Kentucky, Justice Cabinet, General Counsel, William B. Pettus, Asst. Atty. Gen., Office of the Attorney General, Civil & Environmental Law Division, Frankfort, KY, for Defendant-Appellant Gary Rose and Justice Cabinet.

Before: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

GILMAN, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. SILER, J. (pp. 902-03), delivered a separate opinion concurring in part and dissenting in part.

OPINION

GILMAN, Circuit Judge.

A number of attorneys and chiropractors, as well as the proposed publisher of a commercial newspaper to be called The Accidental Journal, filed suit to challenge two Kentucky statutes, one restricting the disbursement of accident reports and the other allowing the state custodian of nonexempt public documents to charge commercial users "a reasonable fee" for producing copies of the reports. The district court permanently enjoined the enforcement of both statutes, finding that they violated the plaintiffs' First Amendment right to freedom of expression. For the reasons set forth below, we AFFIRM the portion of the district court's injunction relating to the

amendments restricting the disbursement of accident reports, but VACATE AND REMAND for further proceedings the portion of the district court's order enjoining the amendments that allow the charging of reasonable fees for copying nonexempt public documents.

I. BACKGROUND

Until 1994, Kentucky Revised Statutes § 189.635(5) provided that "all accident reports filed with the Department of State Police . . . shall remain confidential." Despite the all-encompassing nature of the statutory language, a Kentucky Attorney General's Opinion issued in 1989 determined that the privacy exemption under Kentucky's Open Records Law was "discretionary." This had the effect of making all accident reports accessible to the public. Accident reports soon became a prime source for attorneys and chiropractors in Kentucky to identify prospective clients. As one chiropractor noted: "In order to determine what potential patients would be in need of chiropractic services, I have routinely submitted open records requests to various law enforcement agencies in order to obtain copies of accident reports."

Such accident reports contain the name, address, and driver's license number of those involved in the accident, and a diagram and brief description of the accident itself. After procuring these reports, certain attorneys and chiropractors would use the information contained therein to contact victims and offer their services, often attaching the accompanying accident report to the solicitation letter. Plaintiff James Bogard has in the past made a business out of assisting these attorneys and chiropractors by

supplying them with the accident reports that he has obtained from law enforcement agencies. Bogard also intends to publish a newspaper, The Accidental Journal, that will contain copies of accident reports and that will be marketed primarily to attorneys and chiropractors.

The efforts to solicit potential clients through the procurement and use of accident reports became so incessant that those involved in traffic accidents immediately began receiving large stacks of direct mail solicitations from various attorneys and chiropractors. A typical example of such a mailing is reproduced below:

> Public records indicate you were involved in an automobile accident recently. You may have been injured at the time of the accident. Often times a person finds there was an injury a day or so after the accident. Sometimes a person is stunned or has a surge of adrenaline that masks the symptoms of injury at the time the accident report is made. If you find that you did suffer personal injury due to the automobile accident, I can help you.
>
> For over thirty years I have been representing people like you against insurance companies. I have the knowledge, the expertise, and most of all, the practical wisdom to guide you.
>
> You are not expected to know the usual or unusual methods that insurance representatives use on injured persons. Do not be misled, misinformed or fall prey to an easy settlement from the insurance company. KNOW YOUR LEGAL RIGHTS.
>
> Protect yourself. Get information from a lawyer. You have one body and it has to serve you your

whole life. Make sure you receive the right medical treatment you need.

Just as you expect your doctor to give the proper medical treatment, so should you have an attorney to see that your legal rights are protected. By going to an experienced lawyer you can have the peace of mind that you will be protected and your claim will be well represented.

Not long after the Attorney General's Opinion was issued in 1989, a public groundswell developed against the release of accident reports to attorneys and chiropractors. One editorial described the attorneys who used such accident reports as "greedy, money grubbing lawyers" who seemed "to prey on the misfortunes of others." Ky. Bench & Bar, Summer 1993, at 7. In addition to the solicitations tarnishing the image of the legal community in the eyes of the public, some who received a mailbox full of such letters grew concerned over their personal privacy and safety. One recipient of such direct mail solicitation related his experience as follows:

On April 1, 1993 I was involved in an automobile collision wherein my vehicle was struck in the rear. I was transported to the hospital and was treated for injuries for which I have now recovered.

Shortly after the collision I received via U.S. Mail the following:

1. Solicitation letter from Attorney [A] and a complimentary copy of the police report with his advertisement on the reverse side.

2. Solicitation letter from Attorney [B] and a complimentary copy of the police report.

3. Solicitation letter from Attorney [C].

4. Solicitation letter from Attorney [D].

I additionally received solicitations from various chiropractors but failed to retain that information since it was so voluminous.

Ms. Richardson, if it was my desire to engage the services of an attorney I would do so using my own resources to make such a selection. In addition, I feel that this is a direct infringement upon my right of privacy. It is my desire and constitutional right to maintain privacy. Publicly revealing my home address is unconscionable and unacceptable and a personal affront to my rights.

My occupation is such that it is mandatory that my home address remain confidential. The promulgation of same may place myself as well as my family in danger of physical harm.

(Emphasis in original).

In an attempt to protect accident victims from being hounded by unwanted solicitations from attorneys and chiropractors, the Kentucky general assembly amended § 189.635 and § 61.874 of the Kentucky Revised Statutes in 1994. The relevant text of the amended statutes is reproduced below:

189.635 VEHICLE ACCIDENT REPORTS BY OPERATORS LAW ENFORCEMENT OFFICERS AND AGENCIES – AVAILABILITY TO PARTIES TO ACCIDENT AND NEWS-GATHERING ORGANIZATIONS.

. . . .

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

(6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

Ky.Rev.Stat. Ann, § 189.635 (Banks-Baldwin 1995).

61.874. ABSTRACTS, MEMORANDA, COPIES – AGENCY MAY PROSCRIBE FEE

. . . .

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. . . .

(4)(a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following: 1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records; 2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

Ky.Rev.Stat. Ann, § 61.874 (Banks-Baldwin 1997).

Governor Brereton Jones later stated that he signed the amendments to Kentucky's Open Records Law to "provide [ ] a measure of protection to accident victims" by "prohibit[ing] distribution [of accident reports] for commercial purposes."

Almost immediately after passage, the plaintiffs filed suit against Ann McClure (a custodian of accident reports at a local state police post) and an assortment of other government officials, all in an effort to enjoin enforcement of the statutes. They claimed that the statutes infringe on their First Amendment right to freedom of expression. Following a lengthy hearing, the district court permanently enjoined the enforcement of both statutes, holding that they violated the First Amendment. This timely appeal followed.

II. ANALYSIS

A. The Challenge to § 189.635

The defendants contend that all § 189.635 does is limit the category of people who have access to accident reports. In the defendants' brief, they assert that the statute does not "even hint at . . . or place unconstitutional conditions on the use of this accessed material by restricting speech related purposes." Because § 189.635 is purportedly a "pure denial of access statute," they claim that it is constitutional under the Supreme Court's decision in *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), where the Court noted that the First Amendment does not "guarantee . . . a right of access to all sources of information within government

control." *Id.* at 9, 98 S.Ct. 2588. Section 189.635, however, is not as benign as the defendants would have us believe.

Subsection 6 of § 189.635 clearly restricts a "news-gathering organization" from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report. It is this content-based restriction with respect to news organizations which makes § 189.635 fatally flawed.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court articulated a four-part test to analyze the constitutionality of government regulations limiting commercial speech:

> At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. 2343 (Enumeration added).

1. Protected Expression

The parties agree that the speech at issue is neither illegal nor misleading under the first prong of the *Central*

Hudson test. Rather, their dispute centers around the remaining three prongs.

2. Governmental Interest

The defendants argue that the governmental interest behind § 189.635 is to protect accident victims' privacy and safety by keeping the personal information contained in such reports out of the hands of the general public. We are persuaded that such an interest is substantial, as evidenced by the fact that a number of other courts that have considered similar statutes have reached the same conclusion. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.1994); *Speer v. Miller*, 864 F.Supp. 1294 (N.D.Ga.1994); *cf. Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir.1998) (holding that disclosure of information contained in undercover officers' personnel files violated the officers' privacy interest in preserving their lives and personal security); *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir.1998) (holding that government's asserted interest in protecting the privacy of arrestees is substantial under *Central Hudson*).

As the Supreme Court has noted: "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Indeed, "[the Supreme Court's] precedents . . . leave no room for doubt that the protection of potential clients' privacy is a substantial state interest." *Went For It*, 515 U.S. at 625, 115 S.Ct. 2371

(internal quotation marks omitted). The Court has also "noted that 'a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.' " *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 484-85, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). From this abundance of legal authority, we hold that the government's asserted interest in protecting the privacy and safety of accident victims is substantial and, hence, meets the second prong of the *Central Hudson* test.

3. Advancement of Governmental Interest

Concluding that the government's asserted interest is substantial, however, does not end our inquiry, but requires that we examine the next prong of the *Central Hudson* test – whether the challenged governmental regulation "advances the Government's interest 'in a direct and material way.' " *Rubin v. Coors Brewing*, 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)). The defendants, as the "party seeking to uphold [the] restriction on commercial speech," have the burden of justifying the restriction. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). This burden may not be satisfied by "mere speculation or conjecture." *Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792. Instead, " 'a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Coors Brewing*, 514 U.S. at 487, 115 S.Ct. 1585

(quoting *Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792). When the regulation only provides ineffective or remote support for the government's purpose, it does not withstand constitutional scrutiny. *See Edenfield*, 507 U.S. at 770, 113 S.Ct. 1792.

The district court found that the amended statute does not directly and materially advance the government's interest in protecting the privacy and safety of accident victims. Specifically, the district court noted that "the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the State asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers." *Amelkin v. Commissioner*, 936 F.Supp. 428, 431 (W.D.Ky.1996). The defendants claim that the district court erred in so finding, arguing that a prohibition against the release of accident victims information (1) reduces the opportunity for criminals to misuse such information, either by stalking accident victims or by using the information contained therein to defraud such victims, and (2) serves to prevent the direct and unnecessary intrusion into the private lives and homes of accident victims and their families.

As to the first argument, the defendants have provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of § 189.635, without any evidence of adverse consequences.

For example, the same type of personal information found in accident reports could also be gathered by requesting from the department of motor vehicles information contained on a driver's license. This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech. *See Coors Brewing*, 514 U.S. at 487, 115 S.Ct. 1585. Because the defendants have failed to sustain their burden of proving that this harm is real, we need not consider whether the restriction will alleviate the asserted harm to a material degree. *See id.*

Unlike the defendants' first argument, their second argument in support of the statute – to prevent the direct and unnecessary intrusion into the private lives and homes of accident victims – is at least directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions serve to neutralize the government's attempts to protect the privacy of accident victims. The district court in fact rejected the contention that § 189.635 materially advances the governmental interest in protecting the privacy of accident victims on the very grounds that such an interest is undermined by the exceptions provided for in the statute, particularly the provision allowing accident reports to be obtained and published by news-gathering organizations. *See Amelkin*, 936 F.Supp. at 431. In this respect, § 189.635 "does not restrict all (or probably even most) possible invasions of a person's privacy." *United Reporting*, 146 F.3d at 1139. The fact that newspapers may inspect and report on the information contained in accident reports belies the defendants' claim

that the statute is actually intended to protect the privacy interests of accident victims. *See Amelkin*, 936 F.Supp. at 431.

The exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir.1997). Our conclusion is reinforced by the holding in *Coors Brewing*, 514 U.S. at 476, 115 S.Ct. 1585, where the Supreme Court determined that 27 U.S.C. § 205(e)(2), which prohibited brewers from disclosing the alcohol content of beer on their labels, violated the First Amendment. The Court held that the government's asserted interest in avoiding alcohol "strength wars" was substantial, but that § 205(e)(2) did not directly advance that interest "because of the overall irrationality of the Government's regulatory scheme." *Id.* at 488, 115 S.Ct. 1585. The regulatory scheme was irrational because of the numerous exceptions Congress appended to § 205(e)(2), including an exception for wines and distilled spirits, which were allowed to list alcohol content on their labels, and the failure to extend the ban on disclosing alcohol content to advertisements. *See id.* As the Court observed, "[t]here is little chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Id.* at 489, 115 S.Ct. 1585.

For the same reasons, the exception to § 189.635(5) for news-gathering organizations renders the statute unconstitutional under the First Amendment. There is no rational basis for a statute which purports to advance the

governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. "Having one's name . . . and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney . . . eager to help one overcome his present difficulties (for a fee, naturally)." *United Reporting*, 146 F.3d at 1140. The exceptions to § 189.635 "undermine and counteract" the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*. We therefore conclude that § 189.635(6) fails to satisfy the third prong of *Central Hudson*.

The defendants, however, seek to re-characterize the nature of the affront to accident victims' privacy as being the receipt, often voluminous, of direct mail solicitations from lawyers and chiropractors. But the invasion of an accident victim's privacy does not stem from the victim's mailbox being stuffed by direct mail solicitations from attorneys and chiropractors. If such were the case, then most of us would feel no sense of privacy because of the seemingly unstoppable torrent of junk mail which flows into most citizens' mailboxes. Instead, the true affront to a person's privacy comes from the "solicitor's discovery of the information [contained in the accident report] that led to the solicitation." *United Reporting*, 146 F.3d at 1139; *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].").

As one district court has noted: "It is hard to see how direct mail solicitations invade the privacy of [individuals]. If they don't like the solicitation, they can simply throw it away." *United Reporting Publishing Corp. v. Lungren*, 946 F.Supp. 822, 828 (S.D.Cal.1996); *see also Bolger*, 463 U.S. at 72, 103 S.Ct. 2875 ("Consequently, the short, though regular journey from the mail box to the trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."(internal quotation marks omitted)). Instead, the true motivation behind § 189.635 appears to be directed at preventing attorneys and chiropractors from looking at accident reports, with the secondary consequence that direct mail solicitation practices would be curtailed.

The defendants also claim that the district court erred in not following the Tenth Circuit's decision in *Lanphere & Urbaniak*, 21 F.3d at 1508, which reviewed a similar statute. In that case, the Tenth Circuit held that it had "no trouble" finding that the state's interest in protecting privacy was directly advanced by the statute in question. *Id.* at 1515. The Tenth Circuit failed, however, to provide any reasoning for why it had "no trouble" reaching this conclusion. Instead, the court simply asserted:

> The State's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of those charged with misdemeanor traffic violations and [Driving Under the Influence]. Further, refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by

> solicitors where potential solicitation recipients may be particularly vulnerable.

Id.

We agree with the district court's decision not to follow *Lanphere*. As the Ninth Circuit recently observed: "*Lanphere* fails to take into account the Supreme Court's decision in *Edenfield*, 507 U.S. at 767, 113 S.Ct. 1792 (holding that the third prong of *Central Hudson* requires the challenged regulation to advance the state interests 'in a direct and material way,' not merely a direct or 'reasonably' direct way), and is in conflict with *Coors Brewing*, 514 U.S. 476, 115 S.Ct. 1585." *United Reporting*, 146 F.3d at 1139 n. 4.

Finally, the defendants claim that the statute still advances the interest of protecting the privacy of accident victims because state agencies are required to redact certain personal and private information from any accident report that is provided. The defendants rely on Kentucky Revised Statutes § 61.878(1)(a), which is part of Kentucky's Open Records Law. Nothing in this statute, however, requires that state agencies redact such information from accident reports. Section 61.878(1)(a) only provides that "public records" are excluded from the provisions of Kentucky's Open Records Law if they contain "information of a personal nature" and its release would cause "a clearly unwarranted invasion of personal privacy." There is nothing in the statutory language compelling the custodian of accident records to redact such personal information before providing the report to news-gathering organizations. That a custodian may choose to do so is obviously not sufficient to cure a constitutional infirmity.

4. Restriction on Commercial Speech More Extensive Than Necessary

Because we conclude that § 189.635(6) does not directly advance the asserted governmental interest, there is no need for us to consider the final prong of *Central Hudson* (whether the restriction on commercial speech is more extensive than necessary to advance such interest).

B. Severability

Having concluded that § 189.635(6) violates the First Amendment, we must next determine whether that portion of the statute may be severed without requiring that § 189.635(5) be similarly struck down.

Kentucky's general severability statute, § 446.090, provides as follows:

> It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, . . . unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.

Ky.Rev.Stat. Ann, § 446.090 (Banks-Baldwin 1993).

As noted earlier, the motivating purpose behind the passage of § 189.635(5)-(6) was apparently to protect the

privacy of accident victims from having their accident reports inspected by attorneys and chiropractors who desire to solicit their business. Without § 189.635(6), news-gathering organizations would have no access at all to accident reports. Given the clear public interest in having a general awareness of accidents taking place within the community, we believe "it is apparent that the general assembly would not have enacted the remaining parts without the unconstitutional part." Ky.Rev.Stat. § 446.090. Because retaining § 189.635(5) alone would be contrary to the legislature's intent in passing the amendments to § 189.635(5)-(6), we find that the one cannot be severed from the other. Accordingly, § 189.635(5), given its inextricable links to § 189.635(6), must also fall.

C. The Challenge to § 61.874

This particular case has made a number of trips to our court, each time resulting in it being remanded to the district court because of a procedural irregularity or other infirmity. Unfortunately, a portion of the district court's opinion in this appeal has a similar flaw – it fails to provide any findings of fact or conclusions of law with respect to the "as applied" challenge to § 61.874. The plaintiffs contend that the agency responsible for implementing § 61.874 has applied the "reasonable fee" provision in an arbitrary and discriminatory manner insofar as commercial users are concerned. Their brief alleges that "the Commonwealth increased the cost of the reports from 10 cents per page to $40 per report for non-injury accidents; $90 per report for injury accidents; and $230 per report for fatal accident reports. The Commonwealth proposed to charge Appellee Lyon $17,650 for two weeks

of reports, which previously would have cost him about $68."

While the district court enjoined the enforcement of § 61.874, it did so without making specific findings regarding the following four factors as set forth in *Washington v. Reno*, 35 F.3d 1093 (6th Cir.1994):

> The factors to be considered by a district court in deciding whether to grant a preliminary injunction are well established in this circuit. In making that determination a court must consider: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Id. at 1099.

Without the benefit of such factual findings, it is impossible for us to judge the validity of the plaintiffs' arguments. As this court stated in *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc.*: "A district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." 119 F.3d 393, 399 (6th Cir.1997). In this case, the district court did not make a specific finding with respect to any of the factors enumerated above. Although the plaintiffs cite examples of the allegedly arbitrary and capricious manner in which the agency has charged fees

since the enactment of the statute, no such findings are in the record before us.

Accordingly, we vacate and remand the case back to the district court to make findings of fact and conclusions of law with regard to how § 61.874 has been applied by the state agency. In so doing, we suggest that the court particularly focus on the "creation" language in § 61.874(4)(c)(2). The agency could potentially be using this language to charge commercial users not only for the compilation, storage, and upkeep of such records by the agency itself, but also for the state's investigative and personnel costs that went into "creating" the record. In other words, the agency might be utilizing the "creation" language as a basis to charge more than the agency's marginal or even average cost in producing the records. Instead, the agency might be using this language to recoup the state's costs for law enforcement's investigation that backs up to the creation of accident reports. Any such interpretation of the statute might well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied.

III. CONCLUSION

Having concluded that Kentucky Revised Statute § 189.635(6) violates part three of the *Central Hudson* test, we AFFIRM the district court's decision to enjoin the enforcement of § 189.635(5)-(6) as an unconstitutional infringement on the First Amendment right to freedom of expression. With respect to Kentucky Revised Statute § 61.874, however, the district court's failure to provide any findings of fact or conclusions of law requires that its

decision to enjoin § 61.874 be VACATED and REMANDED for further proceedings consistent with this opinion.

SILER, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent, for I believe that the decision of the district court should be reversed entirely. Therefore, I concur in Part II.C. of the majority opinion where it vacates and remands the district court's decision concerning the challenge to Ky.Rev.Stat. § 61.874. I also concur in Part II.B. (severability), finding that if Ky.Rev.Stat. § 189.635(6) is unconstitutional, then the whole statute is unconstitutional. Nevertheless, because I would find that Ky.Rev.Stat. § 189.635(6) is not unconstitutional, the severability portion is not applicable to my opinion.

Initially, there is no general First Amendment right for the public to access criminal justice records. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir.1994). The majority is correct in analyzing the statute under the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The majority, however, has stopped at the third prong from *Central Hudson*, finding that the regulation does not directly advance the governmental interest asserted.

Agreeing with the majority, I question whether the Commonwealth of Kentucky has shown that the prohibition against the release of the accident victims information reduces the opportunity for criminals to misuse such information, for there seems to be little evidence about that. However, the prohibition certainly serves to prevent

the direct and unnecessary intrusion into the private lives and homes of accident victims and their families. Obviously, the attorneys and insurance carriers for the persons involved in the accident should have access to this information, for they are all representatives of the persons involved. In addition, the Commonwealth has allowed the news media to obtain this information for noncommercial use, that is, for news reports. Although this, to some degree, intrudes into the private lives and homes of the victims, it intrudes much less than publication in a commercial pamphlet intended to aid attorneys and chiropractors in soliciting the victims.

Although the majority finds *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir.1998), more persuasive than the decision in *Lanphere*, I believe *Lanphere* is more persuasive. Therefore, I would follow *Lanphere* and find that the Commonwealth has a substantial interest in the case and that the statute advances those interests in a reasonably direct way. Finally, I would find that the statute effects a reasonable fit under the framework of *Central Hudson*.

Stephen AMELKIN, D.C., et al., Plaintiffs,

v.

COMMISSIONER, DEPARTMENT OF STATE POLICE, et al., Defendants.

Stephen AMELKIN, D.C., et al., Plaintiffs,

v.

JEFFERSON COUNTY, KENTUCKY, et al., Defendants.

JUSTICE CABINET, Department of State Police, et al., Plaintiffs,

v.

David KAPLAN, Defendant.

Nos. 3:94CV-360-A, 3:95CV-22-A.

United States District Court,
W.D Kentucky.

June 3, 1996.

Donald L. Cox, Lynch, Cox, Gilman & Mahan, Louisville, KY; and David A. Friedman, Taustine, Post, Sotsky, Berman, Fineman & Kohn, Louisville, KY, for plaintiffs.

Barbara Jones, Office of General Council, Corrections Cabinet, Frankfort, KY; Lucy B. Richardson, KY, Justice Cabinet, Frankfort, KY; William B. Pettus, Office of the Atty. General, Frankfort, KY; John L. Arnett, Elizabethtown City Attorney Office, Elizabethtown, KY; N. Scott Lilly, First Assistant County Attorney, Louisville, KY, for defendants.

MEMORANDUM OPINION

ALLEN, Senior District Judge.

Plaintiffs in this action are eight attorneys, two chiropractors, and an individual who supplies information to lawyers and other persons regarding motor vehicle accidents. Plaintiffs challenge the constitutionality of KRS 189.635, as amended by Kentucky Senate Bill 351, and seek an injunction granting them access to vehicle accident reports which are filed with the Department of State Police. Defendants desire to keep the reports from those in plaintiffs' position, relying on the confidentiality features of KRS 189.635, as amended. Subsection 5 of the statute provides, in essence, that accident reports shall remain confidential subject to an exception that the Department of State Police may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. Subsection 5 of the amended Senate Bill 351 also provides that all other accident reports shall be confidential except when produced subject to a court order or subpoena or except for subsection 6. It further states that the report shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party.

Subsection 6 of Senate Bill 351, however, allows the report to be made available to a news-gathering organization which is not to distribute the report or allow its use or distribution for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report.

A close question is presented to the Court as to the constitutionality of the statutes challenged by the plaintiffs. There is a conflict in the decisions of the Eleventh Circuit and the Tenth Circuit as evidenced by the decisions in *Speer v. Miller,* 15 F.3d 1007 (11th Cir.1994), and *Lanphere & Urbaniak v. State of Colorado,* 21 F.3d 1508 (10th Cir.1994). In addition, the decisions in *Moore v. Morales,* 843 F.Supp. 1124 (S.D.Texas 1994), and *Innovative Database Systems v. Morales,* 990 F.2d 217 (5th Cir.1993), hold that Texas may not prohibit chiropractors or attorneys from receiving access to motor vehicle accident reports on the grounds that they will use the information for financial gain. The Texas statute also prohibited chiropractors from directly soliciting patients or potential patients known to have been involved in motor vehicle accidents or work-related accidents, or who had been injured by another person. In *Moore v. Morales,* 843 F.Supp. 1124 (S.D.Tex.1994) Judge Hittner noted that Texas statutes allowed certain classes of people to obtain accident reports within 180 days while others could not. He therefore held that this statute was not reasonably related to the state's interest in protecting individual's privacy rights.

In *Speer v. Miller,* 15 F.3d 1007 (11th Cir.1994), the Court addressed a Georgia statute providing that it was unlawful for anyone to copy or inspect any records of a law enforcement agency concerning crimes or motor vehicle accidents for the purpose of commercially soliciting the victims or relatives of these individuals. Plaintiff Speer, an attorney licensed to practice in Georgia, filed an action seeking to enjoin enforcement of the statute on the grounds that it violated the First, Fifth and Fourteenth

Amendments. The lower court dismissed both the First Amendment and the Equal Protection challenges.

In reversing and remanding the action, the Eleventh Circuit Court of Appeals noted that "[s]tatutes that restrict commercial speech must directly advance a substantial government interest and the state bears the burden of justifying its restrictions. *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir.1991), aff'd, 507 U.S. 761, 113 S.Ct. 1792 [123 L.Ed.2d 543] (1993)." *Speer*, 15 F.3d at 1010. The *Speer* court also indicated that although it appeared likely that plaintiffs' commercial speech claims would prevail, the state was entitled to develop its interest. On remand, the District Court noted the statute's explicit permission of publication by news media, and rejected the State's claim that the statute protected privacy. *Speer v. Miller*, 864 F.Supp. 1294 (N.D.Ga.1994). The aim of the Georgia statute, like that challenged here, was not to keep information from becoming public, but to diminish the likelihood of a particular use of that information, i.e., commercial solicitation.

In *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508 (10th Cir.1994), a two to one decision, the Tenth Circuit affirmed the lower court's holding that a statute denying access to records of official actions and criminal justice records unless such person seeking the report signed a statement stating that the records would not be used for the direct solicitation of business for pecuniary gain was not violative of the First and Fourteenth Amendments. *Id.* at 1510-11, 1516.

While this Court chooses to follow the dissenting opinion of Judge Aldisert in *Lanphere*, it is important to analyze both the majority opinion and Judge Aldisert's dissenting opinion. The Colorado statute provided that no person could obtain a record of official actions in criminal justice records unless he or she signed a statement affirming that the records would not be used for the direct solicitation of business for pecuniary gain. The plaintiffs, who were two attorneys and a Director of a Drug and Alcohol Treatment Center, refused to sign the statement because they wanted to use the names and addresses to engage in direct mail advertising for the purpose of soliciting business for pecuniary gain. Prior to the bringing of the action, access to the records had been granted, as it had in the case at bar prior to the amendment of the applicable statutes.

The majority opinion held, first, that there is no constitutional right of access to public records, but did not end the analysis there, and went on to review the case under the principles asserted in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 560-566, 100 S.Ct. 2343, 2347-2351, 65 L.Ed.2d 341 (1980). In that case the court set out a four-part test because the statute disadvantaged commercial speech. The first part of the test is whether the expression is protected by the First Amendment. In order to be protected it must concern lawful activity and not be misleading. The next question is whether the asserted governmental interest is substantial. Then, if both questions yield positive answers, the court must determine whether the regulation directly advances the governmental interest asserted, and fourth,

whether it is not more extensive than is necessary to serve that interest.

The *Lanphere* majority held that the commercial speech affected by the Colorado statute came within the protection of the First Amendment because direct mail advertising concerned lawful activity which would not necessarily be misleading. The majority then went on to hold that the interest of the state was the need to protect the privacy of those charged with misdemeanor traffic offenses and DUI. The court held that this was a substantial interest even though the identity of those charged might be available through local newspapers. The court stated, "even if the information is available to some degree through other sources, the state's interest in not aiding in the dissemination of the information for commercial purposes remain." *Lanphere*, 21 F.3d at 1514. The majority also held that there was a substantial state interest in lessening the danger of solicitation abuse. The court held that the statute advanced the State's interests in protecting privacy in a direct manner. Finally, the court held that the regulation was not more extensive than was necessary.

In his dissenting opinion, Judge Aldisert did not cite the *Central Hudson* case so strongly relied upon by the majority. Instead, he approached the resolution of the case by analyzing the teachings of *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). Judge Aldisert cites that case as authority in dealing with the claim of First Amendment rights to criminal proceedings. There are two complementary considerations. The first is whether there has been a "tradition of accessibility" which implies a favorable judgment of

experience. Secondly, "the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question."

Judge Aldisert held that where criminal records are concerned, there is a presumption of public access to criminal trial documents and criminal proceeding documents, and also held that public access to the State's criminal justice record add to the judicial process.

While the case at bar does not involve criminal proceedings and the records of them, Judge Aldisert observed that the State of Colorado had not attempted to prohibit the publication of the names of those involved in criminal proceedings in the local newspapers. He stated that a prohibition against the newspaper's using such information would be a violation of the First Amendment, but then stated, "The statute is far too underinclusive to protect the privacy interests of those arrested for this offense." 21 F.3d at 1519. Judge Aldisert pointed out, "the issue is . . . whether the State has the power to place off limits to certain sectors of society records which hitherto been open to all." 21 F.3d at 1519.

While the case at bar differs somewhat from *Lanphere*, it is obvious that the State of Kentucky is trying to prohibit attorneys and chiropractors from access to a record which has been compiled by the public and which is available to media and insurance companies representing the parties, and which had been previously available to the public. We believe that the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the

State asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers. The Court realizes that the majority opinion in *Lanphere* and the dissenting opinion differ as to their opinion about the effect of the newspapers having information and publishing it while it is not made available to attorneys and others who want to use it for a commercial use.

In conclusion, this is a very close case, but we believe that the dissenting opinion in *Lanphere,* together with the opinions in *Speer v. Miller,* 15 F.3d 1007 (11th Cir.1994), and *Moore v. Morales,* 843 F.Supp. 1124 (S.D.Tex.1994), are authority for our holding that the statute is unconstitutional. In reaching that decision we realize that direct attorney solicitation by mail of accident victims or similar solicitation by health practitioners may be offensive to some of the recipients but this fact does not justify a ban on mail solicitation. *See Shapero v. Ky. Bar Assn.,* 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). The Court recognizes that since its original decision in the case at bar the Supreme Court has decided *Florida Bar v. Went For It, Inc.,* ___ U.S. ___, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) holding that the Florida Bar Association may prevent its attorneys from soliciting accident victims for a period of thirty days. That case, however, involved only a regulation by the State Bar and the efforts of that Bar to protect injured Floridians from invasive conduct from lawyers. The question of access to public records was not directly presented in that case.

The Court will enter a judgment consistent with this opinion.

JUDGMENT

On motion of the plaintiffs, and the Court being sufficiently advised, defendants are hereby preliminarily and permanently enjoined from enforcing the 1994 amendments to KRS 189.635 and KRS 61.874, et seq., and from enforcing KRS 438.065.

This is an appealable judgment, and there is no just cause for delay.

Stephen AMELKIN, Broadway Chiropractic; Brian Christopher Fee, Dr., Chiropractor; Stuart Lyon; Nicolas Baker; David Kaplan; James W. Chambers; Sidney Hanish; Rhoda Daniels; Thomas H. Watson; Kenneth W. Wall; James Bogard, doing business as Bogard & Associates, Plaintiffs-Appellees,

v.

Ann McCLURE, Document Custodian Kentucky State Police Post # 4; Jerry Lovitt, Commissioner of Department of State Police, Commonwealth of Kentucky; Chris Gorman, Attorney General of the Commonwealth of Kentucky, Defendants-Appellants.

No. 94-6161.

United States Court of Appeals, Sixth Circuit.

Jan. 9, 1996.

On Appeal from the United States District Court, for the Western District of Kentucky, No. 94-00360; Charles M. Allen, District Judge.

W.D.Ky.

REMANDED.

Before: LIVELY, NELSON and SUHRHEINRICH, Circuit Judges.

SUHRHEINRICH, Circuit Judge.

Defendants Jerry Lovitt, commissioner of the Kentucky state police, Christopher Gorman, Kentucky's attorney general, and Ann McClure, a clerk at a local state police post,[1] appeal from the district court's preliminary

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[1] Plaintiffs concede that McClure is not a proper defendant. *See* Ky.Rev.Stat.Ann. §§ 189.635(1) and 61.870(5) (Baldwin Supp.1995). Subsequent to the filing of this appeal, the district court dismissed McClure.

injunction enjoining enforcement of Act of April 11, 1994, 1994 Ky.Rev.Stat. & R.Serv. 478 (Baldwin) ("Senate Bill 351"). Subject to certain exceptions, Senate Bill 351 amends Ky.Rev.Stat.Ann § 189.635 (Baldwin Supp.1995) to restrict access to state-maintained motor vehicle accident reports. Plaintiffs are eleven individuals who seek to use these reports to solicit clients. The district court granted plaintiffs' motion for preliminary injunction on the ground that Senate Bill 351 violates the First Amendment.

Defendants raise several issues on appeal, including: (1) whether plaintiffs have presented a justiciable claim; (2) whether defendants were given adequate notice and opportunity to respond to the motion for preliminary injunction; and (3) whether the district court correctly ruled that Senate Bill 351 violates plaintiffs' First Amendment right to engage in commercial speech. We hold that plaintiffs presented a justiciable claim with respect to each of the separate provisions of Senate Bill 351. We conclude, however, that Lovitt was not given adequate opportunity to oppose plaintiffs' motion. Because this issue is dispositive, we do not reach defendants' other assignments of error. The preliminary injunction is DISSOLVED and the issue REMANDED to the district court.

BACKGROUND

Kentucky law requires motorists involved in certain kinds of accidents and/or law enforcement officers investigating such accidents to file motor vehicle accident reports with the Kentucky Department of State Police. Ky.Rev.Stat.Ann. § 189.635. These reports require that

certain information be disclosed, including the names and addresses of the operators of the vehicles involved, the results of chemical tests administered, and a description of the accident.

In 1994, Kentucky passed Senate Bill 351 which amended § 189.635 to read in relevant part as follows (the underlined portion is the amendment added by Senate Bill 351):

> (5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity in [sic] not otherwise known or when he denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.
>
> (6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information

> in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

(Emphasis added.) The amendment became effective July 15, 1994.

Plaintiffs are eight attorneys and two chiropractors who have in the past used vehicle accident reports filed with the Kentucky Department of State Police to solicit clients. The eleventh plaintiff, James Bogard, is in the business of supplying information contained in the vehicle accident reports to lawyers and other professionals. All eleven claim an intent to continue their past practices.

In addition, Bogard alleges an intent to publish a newsletter entitled "The Accident Journal." He claims that the newsletter will contain copies of accident reports and that it will be marketed primarily to attorneys. Other than a mock-up presented to the district court, he has taken no steps towards the publication of this periodical.

Plaintiffs filed the instant action on June 6, 1994, at which time they also filed a motion for a preliminary injunction to enjoin enforcement of Senate Bill 351. The sole named defendant was Ann McClure, a clerk at a local state police post.[2] The district court held a hearing on plaintiffs' motion on July 14, 1994. Based on arguments made by McClure's attorney, the court concluded that the proper defendant was not McClure but Jerry

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[2] Lucy Richardson, Deputy General Counsel for the Justice Cabinet, has represented both McClure and Jerry Lovitt throughout their entire involvement in this litigation.

Lovitt, commissioner of the Kentucky state police. *See* Ky.Rev.Stat.Ann. §§ 189.635(1) and 61.870(5) (Baldwin Supp.1995).[3] As a result, the district court entered an order delaying adjudication of the merits of plaintiffs' motion until Lovitt had been joined as a party and properly served. Plaintiffs amended their complaint to add Lovitt and Christopher Gorman, Kentucky's attorney general. On August 2, 1994, after Lovitt and Gorman had been served but two days before they answered plaintiffs' amended complaint, the district court granted the motion for preliminary injunction.

At the preliminary injunction hearing, plaintiffs argued that Senate Bill 351 imposes a direct restraint on the speech of "news-gathering organizations" and, when read in its entirety, constitutes an indirect attempt to restrict direct-mail solicitation by attorneys and other business people. On the merits, McClure countered that Senate Bill 351 merely restricts access to government records and does not implicate the First Amendment. Alternatively, McClure contended that Senate Bill 351 is a

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[3] Ky.Rev.Stat.Ann. § 189.635 states in relevant part:

> (1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all vehicle accidents which occur within the Commonwealth.

Ky.Rev.Stat.Ann. § 61.870 states in relevant part:

> (5) "Official custodian" means the the [sic] chief administrative officer or any other officer or employee of a public agency who is responsible for the maintenance, care and keeping of public records. . . .

justified restriction on commercial speech given Kentucky's substantial interest in protecting the privacy of motorists.

The district court characterized Senate Bill 351 as a content-based restriction on commercial speech subject to intermediate scrutiny. *See Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2375-76 (1995) (reiterating the test for content-based restrictions on commercial speech). It then concluded that § 189.635 as amended is not narrowly tailored to meet Kentucky's asserted privacy interest because the statute permits newspapers to publish the accident reports. Therefore, the district court enjoined enforcement of Senate Bill 351.

ANALYSIS

A. Standing and Ripeness

To establish standing, a plaintiff must allege and prove an actual or threatened injury, a causal connection between that injury and the defendant's conduct, and redressability. *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 715 (6th Cir.1995). The issue of standing is a question of law reviewed de novo on appeal. *Id.*

Section 189.635(5) bars access to the motor vehicle accident reports except for, inter alia, the parties themselves, their attorneys, and insurers of those involved. Section 189.635(6) contains an added exception for "news-gathering organizations" provided that these organizations do not permit the information in the accident reports to be used for commercial speech purposes.

Defendants contend that there is no case or controversy as required by Article III of the U.S. Constitution because, at the time of the filing of suit, plaintiffs had not been refused access and had therefore not suffered any injury. Even if plaintiffs had standing to challenge § 189.635(5), defendants contend that plaintiffs did not have standing to challenge § 189.635(6) because Bogard, who is not currently a publisher and who has merely alleged an intent to publish, set forth only a hypothetical claim.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbit v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979). A plaintiff need not actually suffer the harm, however, provided that the injury is sufficiently certain to occur. *Id.*; *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) (indicating that the harm must be "certainly impending"). This is especially true where First Amendment rights are implicated because of the fear that speech will be chilled before the law, regulation, or policy is enforced. *Greater Cincinnati,* 56 F.3d at 715-16; *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale,* 922 F.2d 756, 760 (11th Cir.1991).

We hold that plaintiffs had standing to challenge § 189.635(5). Although plaintiffs initiated this action before Senate Bill 351 became effective, the alleged harm, i.e., the denial of access and the consequent restriction on speech, was virtually certain to occur. At the time of filing, Senate Bill 351 had already been enacted and would become effective in less than sixty days. Further, it is undisputed that plaintiffs had in the past obtained accident records and that, but for the amendment to

§ 189.635, they would continue to do so. In light of defendants' stated intent to enforce Senate Bill 351, we conclude that the harm alleged by plaintiffs was sufficiently imminent to satisfy the injury in fact element of standing with respect to § 189.635(5) *See Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 491-92 (6th Cir.1995) (standing to challenge election law exists where plaintiff intended to run for office in future and where the elections committee stated that plaintiff's past violation of the law would be used in any future investigation).

The closer question is whether Bogard has standing to challenge § 189.635(6). Standing requirements are relaxed in the context of the First Amendment, but a plaintiff must still allege an injury which is real and imminent and not conjectural or hypothetical. *Greater Cincinnati*, 56 F.3d at 716. The less likely a plaintiff is to engage in a proscribed activity, and/or the more vague his intentions, the less real and imminent the harm becomes. *See, e.g., id.* at 716 (no standing where plaintiff disavows intent to violate statute); *Hallandale Professional Fire Fighters*, 922 F.2d at 761-62 (public employees do not have standing to challenge a statute restricting speech where they fail to allege an intent to violate the statute or to state clearly what they intend to say). Arguably, Bogard has not suffered any greater harm than the public at large because he has yet to take any significant steps towards publishing his newsletter and therefore has not suffered the requisite injury in fact.

Bogard alleges an intention to publish a newsletter containing the accident reports. To the extent that § 189.635(6) prohibits this kind of publication, and thereby deters Bogard from becoming a publisher, he has

suffered a direct restriction on his freedom of speech. *See Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630 (7th Cir.) (self-censorship caused by prescriptive statute constitutes a direct harm where there is a threat it will be enforced against plaintiff), *cert. denied*, 498 U.S. 959 (1990). Bogard cannot be faulted for failing to invest labor and capital in furtherance of his newsletter when, at the time of the suit, the venture would shortly become prohibited by law. Therefore, we hold that Bogard does have standing.

In addition, we must determine whether Bogard's challenge to 189.635(6) is ripe. Unlike standing, which involves who may bring suit, ripeness depends on whether the facts are sufficiently developed to permit adjudication. *Hallandale Professional Fire Fighters*, 922 F.2d at 760 n.3. Ripeness turns on a two-part test involving "the fitness of the issues for judicial determination and the hardship to the parties of withholding consideration." *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C.Cir.1995) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)), *petition for cert. filed*, 64 U.S.L.W. 3298 (U.S. Oct. 16, 1995) (No. 95-620). A case is relatively more fit for judicial review if it involves few contingent future events and/or depends largely on matters of law. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir.1995). The customary ripeness analysis is relaxed in cases involving a facial challenge to a statute on First Amendment grounds.

> First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment

> claims ripe, often commenting directly on the special need to protect against any inhibiting chill.

Id. at 1500 (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3532.3 at 159 (2d ed. 1984)).

We conclude that Bogard's claim is ripe for review. As defendants themselves note, this case turns largely on matters of law and not on contingent matters of fact; at the heart of this controversy is whether § 189.635(6) violates the First Amendment. Granted, Bogard has taken few steps towards publishing his newsletter. The issues presented and their resolution, however, would not be any clearer had Bogard performed additional acts.

Further, failure to consider Bogard's claim imposes unnecessary hardship on Bogard. The question of hardship typically turns upon whether the challenged action creates " 'a direct and immediate' dilemma for the parties." *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 496 (1st Cir.1992) (citation omitted). Here, the dilemma faced by Bogard is this: invest labor and capital in a venture which is currently prohibited by law, or make no such effort and suffer a restriction on his speech. Because the issue is largely one of law and because Bogard faces a current dilemma, we find that Bogard's challenge to § 189.635(6) is ripe for review.

B. Notice

Lovitt and Gorman argue that they were given inadequate opportunity to oppose plaintiffs' motion in violation of Rule 65(a) of the Federal Rules of Civil Procedure.

Plaintiffs contend that, as a practical matter, the interests of Lovitt and Gorman were adequately represented by McClure at the July 14, 1995 hearing. We review for abuse of discretion a district court's determination that the parties received notice of the preliminary injunction sufficient to satisfy Fed.R.Civ.P. 65(a). *Illinois v. Peters*, 871 F.2d 1336, 1340 (7th Cir.1989); *United States v. Alabama*, 791 F.2d 1450, 1458 (11th Cir.1986) (citing *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 302 (5th Cir.1978), *cert. denied*, 479 U.S. 1085 (1987 [sic])).

Rule 65(a) provides that "[n]o preliminary injunction shall be issued without notice to the adverse party." Fed.R.Civ.P. 65(a). This notice requirement implies "a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir.1991) (quoting *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 433 n.7 (1974)); *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 573 (6th Cir.1978) (Rule 65 "contemplates that the issuance of a preliminary injunction shall be upon notice to the adverse party and after a hearing. A hearing embodies the right to be heard on the controverted facts, as well as upon the law." (citation omitted)).

The requirements of Rule 65(a) are not mere procedural formalities. Rather, these requirements are grounded in the fundamental values of our judicial system. *Cf. Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir.1990) (Rule 65(b)'s restriction on ex parte "temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be

heard. . . . " (quoting *Granny Goose Foods*, 415 U.S. at 439)). Thus, courts have not hesitated to dissolve a preliminary injunction issued without sufficient notice or opportunity to contest issues of fact or of law. *See, e.g., Western Water Management, Inc. v. Brown*, 40 F.3d 105, 109 (5th Cir.1994) (order modifying injunction invalid where adversely affected party not given notice that contempt hearing could result in modification of injunction); *Parker v. Ryan*, 960 F.2d 543, 545 (5th Cir.1992) (order freezing assets of the defendant's former wife, who was not a party to the action, invalid where formal notice of the hearing was received two business days prior to hearing).

In the case at bar, the district court concluded that Lovitt and not McClure was the proper person to defend Senate Bill 351. Neither party challenges this ruling on appeal. Therefore, Lovitt had a right to argue on his own behalf against the preliminary injunction pursuant to Fed.R.Civ.P. 65(a).

Although the district court recognized Lovitt as the proper defendant, it issued its order without permitting Lovitt to contest the injunction. Plaintiffs correctly note that the court withheld adjudication of the merits until after Lovitt had been served. But merely delaying adjudication is meaningless where, as here, the adversely affected party is not given the chance to argue his position. Because the district court recognized Lovitt's interest in the preliminary injunction but failed to afford Lovitt an opportunity to be heard, we conclude that the grant of the preliminary injunction was an abuse of discretion in violation of Rule 65(a).

Plaintiffs contend that Lovitt's interests were adequately represented by McClure. Specifically, they argue that McClure, in defending herself, put forth all of the relevant arguments in support of Senate Bill 351. According to plaintiffs, the fact that McClure and not Lovitt made these arguments is irrelevant because it is ultimately the state's interests which are at stake. Plaintiffs note that Lovitt's attorney, Lucy Richardson, was McClure's attorney at the preliminary injunction hearing. Plaintiffs further point out that the validity of Senate Bill 351 is largely a legal issue and does not involve facts unique to Lovitt.

All parties agree that the proper defendant is the commissioner of state police, who in this case is Lovitt. An injunction against McClure, a clerk at a local state police office, would be both improper and meaningless because she does not have authority to comply with the court order. Accordingly, McClure has less incentive to defend the validity of Senate Bill 351 than does Lovitt. In addition, because McClure is an improper party, she has different litigation strategies available to her. For example, one of McClure's first arguments at the preliminary injunction hearing was that she is an improper party, an argument which she has repeatedly put forth during the course of this litigation. In short, the interests of Lovitt and McClure are not so closely aligned that we will indulge in the fiction that Lovitt was constructively represented by McClure. The fact remains that Lovitt was simply not given an opportunity to oppose plaintiffs' motion for preliminary injunction and therefore the injunction must be dissolved.

At oral argument and in briefs filed subsequently, the parties disagreed as to whether Gorman is subject to the preliminary injunction and thus whether he was entitled to notice prior to the issuance of the court's order. In light of our decision to dissolve the preliminary injunction and remand for a new hearing, the issue is moot and therefore we do not address it.

CONCLUSION

We DISSOLVE the district court's preliminary injunction and REMAND the issue to district court for a new hearing. We express no opinion on the merits of this litigation or the appropriateness of a preliminary or permanent injunction.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

STEPHEN AMELKIN, C.D., et al.,

Plaintiffs,

Civil Action No.
C94-0360-L(A)

v.

ANN McCLURE, Document Custodian
Kentucky State Police, et al.,
Defendants.

MEMORANDUM OPINION

Plaintiffs are eight attorneys, two chiropractors, and an individual who supplies information to lawyers and other persons regarding motor vehicle accidents. At issue is KRS 189.635, as amended by Kentucky Senate Bill 351 ["Senate Bill 351"][1] Plaintiffs challenge the amended statute as unconstitutional under the First, Fifth, and Fourteen Amendments. Following a hearing on plaintiffs' motion for a preliminary injunction, Fed. R. Civ. P. 65, as well as subsequent service on the Commissioner of the Department of the State Police, Jerry W. Lovitt,[2] and on the Attorney General of the Commonwealth of Kentucky, Christopher Gorman,[3] the action was submitted for

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[1] Senate Bill 351 was enacted March 30, 1994; its amendments to KRS 189.635 became effective July 16, 1994.

[2] Regarding execution of service on Commissioner Lovitt, *see* Declaration of Server, Rodney J. Harris, July 15, 1994.

[3] Regarding execution of service on Attorney General Gorman, *see* Declaration of Server, Jennifer L. Faith, July 19, 1994.

decision on the merits. For the reasons set forth below, plaintiffs' motion for a preliminary injunction will be granted.

KRS 189.635 governs "vehicle accident reports by operators, law enforcement officers, and agencies. Subsection (5) of the statute provides as follows:

> [a]ll accident reports filed with the Department of State Police . . . shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident.

As amended by Senate Bill 351, subsection (5) also provides that:

> [a]ll other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

Senate Bill 351 also amends KRS 189.635 by adding subsection (6), which provides as follows:

> [t]he report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or

> distribution, for a commercial purpose other than the news-gathering organizations publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

KRS 189.635 as amended.

The plaintiffs who are attorneys argue they have a constitutional right to see the accident reports and to solicit business from those persons involved in such accidents. Likewise, the plaintiffs who are chiropractors contend they are constitutionally entitled to know the names of the victims of accidents in order that they may offer to furnish services to them. Finally, plaintiff James Bogard, a business person who furnishes certain types of information to lawyers and other businesses, including motor vehicle accident reports, also claims similar constitutional rights.

On the merits, the Commonwealth argues it has the right to deny access to the accident reports because such denial advances the privacy interests of those involved in vehicular accidents.

In *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993) (*reh'g denied* June 16, 1993), a Texas statute provided, in relevant part, that:

> [a] person who has possession of crime victim or motor vehicle accident information that the person obtained or knows was obtained from a law enforcement agency may not use the information to contact directly a person who is a crime

> victim or who was involved in a motor vehicle accident or a member of the person's family for the purpose of soliciting business from the person or family member.

Id. at 219.

The statute also prohibited the selling of such information to other persons for financial gain. *Id.* In addition, it prohibited chiropractors from directly soliciting patients or potential patients known to have been involved in motor vehicle or a work-related accidents [sic] or who had been injured by another person. *Id.*

The *Morales* Fifth Circuit affirmed the lower court, holding that although Texas has an interest in " 'promoting the ethical standards that are necessary in its licensed professions, particularly in the legal profession,' " *id.* at 221, that "very substantial interest" did not justify "a total ban on the use of lawfully obtained, public information to contact any person who was recently involved in an motor vehicle accident or who has been the victim of crime . . . ." Such a ban is "too broad a prohibition to prevent the perceived evil." *Id.* The *Morales* Court further held that "an outright ban on the sale of public information, with no regard for the truth of the information, [was] too broad a means of effectuating the intended purpose of the law." *Id.* at 222.

In *Moore v. Morales*, 843 F.Supp. 1124 (S.D. Tex. 1994), a Texas statute prohibited attorneys, chiropractors, physicians, and other professionals licensed by the state "from sending any written communications to targeted potential clients with the intent of obtaining professional employment within thirty days of an accident, criminal

arrest, or the filing of a civil lawsuit." *Id.* at 1126. The Texas legislature also amended the Uniform Traffic Act, which prohibited release of accident reports for 180 days from the date of accident. The amendments, however, allowed certain designated classes of persons, including insurance agencies and the news media to obtain these reports within 180 days of the accident. *Id.* In addition, the Texas Uniform Traffic Act acted in concert with the Texas Barratry [sic] Statute, the latter providing that "accident reports 'must include a means of designating whether an individual involved in an accident does or does not desire to be contacted by persons seeking professional employment . . . .' " *Id.*

In striking the amendments as unconstitutional, District Judge Hittner noted that because the amendments allowed certain classes of people to obtain accident reports within 180 days while other classes could not, the regulations were not reasonably related to the state's interest in protecting individuals' privacy rights. *Id.* at 1129.

As stated by Judge Hittner, for these types of regulations to withstand constitutional scrutiny as mandated by the Supreme Court, the state bears

> the burden of proving that [its] interests are substantial state interests, that the State's interest is directly advanced by the regulations and that there is a reasonable fit between the State's interest and the regulation [citations omitted]. In this case, each of the interests articulated by the State of Texas . . . has been addressed by the

> Supreme Court and rejected as not comprising a 'substantial state interest.'

Id. at 1127.

In *Speer v. Miller,* 15 F.3d 1007 (11th Cir. 1994), Georgia passed a statute providing that it was unlawful for anyone to copy or inspect any records of a law enforcement agency concerning crimes or motor vehicle accidents for the purpose of commercially soliciting the victims or relatives of these individuals. Plaintiff Speer, an attorney licensed to practice in Georgia, filed an action seeking to enjoin enforcement of the statute on the grounds that it violated the First, Fifth and Fourteenth Amendments. The lower court dismissed both the First Amendment and the Equal Protection challenges.

In reversing and remanding the action, the Eleventh Circuit Court of Appeals noted that "[s]tatutes that restrict commercial speech must directly advance a substantial government interest and the state bears the burden of justifying its restrictions. *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466 (1988); *Fane v. Edenfield,* 945 F.2d 1514 (11th Cir. 1991), *aff'd,* ___ U.S. ___, 113 S.Ct. 1792 (1993)." *Speer,* 15 F.3d at 1010. The *Speer* Court also indicated that although it appeared likely that plaintiffs' commercial speech claims would prevail, the state was entitled to develop its interests. *Id.*

In *Lanphere & Urbaniak v. State of Colorado,* 21 F.3d 1508 (10th Cir. 1994), a two to one decision, the Tenth Circuit affirmed the lower court's holding that a statute denying access to records of official actions and criminal justice records unless such person seeking the report signed a statement stating that the records would not be

used for the direct solicitation of business for pecuniary gain was not violative of the First and Fourteenth Amendments. *Id.* at 1510-11, 1516.

In a persuasive dissent by Senior Circuit Judge Aldisert, he noted that "Colorado concedes that all of the information denied to Appellants by the statute is accessible to them through the El Paso County News, the official weekly newspaper for El Paso County, Colorado." *Id.* at 1518. Indeed, Judge Aldisert continued:

> [t]he State's interest in preserving the right of privacy of those arrested for driving under the influence is not so compelling that [it has] attempted to prohibit the publication of the names of these individuals in the El Paso County News. No citation is necessary to indicated [sic] that any attempt to prevent publication of this information by the news media would be a violation of prior restraint precepts of the First Amendment. The statute is far too underinclusive to protect the privacy interest of those arrested for this offense.

Id. at 1518-19.

It is axiomatic that advertising by lawyers now falls within a category of constitutionally protected commercial speech. *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466 (1988). Thus, according to Judge Aldisert, the issue is:

> not whether [the State] is obliged to provide a client bases [sic] to the Appellants. . . . Rather, the question is to what extent may [the State] deny public access, irrespective of the motivation for the access, so long as the motivation is not for any unlawful purpose. In my view, a

> desire for pecuniary gain in the world's strongest capitalistic society operating under a democratic political system has not yet been declared unlawful, offensive, or unconstitutional.

Lanphere, 21 F.3d at 1519.

In the case at bar, just as in *Lanphere*, the state's purported interest in preserving individual privacy is undercut by allowing the news media access to the information.

In conclusion, this Court is of the opinion that the reasoning and decisions in the two *Morales* opinions and the *Speer* opinion coupled with the dissenting opinion in *Lanphere* are persuasive.

A judgment in accordance with this opinion will be entered this day.

Date: August 2, 1994

/s/ Charles M. Allen
CHARLES M. ALLEN,
Senior Judge

cc: Counsel of Record
(ENTERED Aug. 2, 1994)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

STEPHEN AMELKIN,
C.D., et al.,

Plaintiffs,

Civil Action No.
C 94-0360-L(A)

v.

ANN McCLURE,
Document Custodian
Kentucky State Police, et
al.,

Defendants.

JUDGMENT

This action having come before the Court on plaintiffs' motion for a preliminary injunction, Fed. R. Civ. P. 65, and the Court after having considered the parties' oral arguments and memoranda having entered this day its memorandum opinion, accordingly, after due consideration with the Court fully advised,

IT IS ORDERED AND ADJUDGED that Senate Bill 351 to the extent that it denies access to motor vehicle accident reports sought by attorneys, chiropractors, and other persons be, and hereby is, found unconstitutional.

IT IS FURTHER ORDERED that defendants with custody over such motor vehicle accident reports shall provide access to said reports sought by attorneys, chiropractors, and other persons seeking access.

IT IS FURTHER ORDERED that a bond in the amount of $10.00 (ten dollars) be, and hereby is, imposed.

This is an appealable order, and there is no just cause for delay.

Date: August 2, 1994

/s/ Charles M. Allen
CHARLES M. ALLEN,
Senior Judge

cc: Counsel of Record

(Entered Aug. 2, 1994)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
NO. 95-5645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHERN KENTUCKY CHIROPRACTIC, A Partnership Consisting of Joseph Scott and Bryan Johnson, D.C.,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
Plaintiff-Appellee,	)	
v.	)	
STEVE RAMEY,	)	(Filed Jan. 29, 1997)
Defendant-Appellant.	)	

BEFORE: GUY, NELSON, and BATCHELDER, Circuit Judges

ALICE M. BATCHELDER, Circuit Judge. Defendant Steve Ramey appeals from the district court's order enjoining him, as the custodian of records for the Lexington-Fayette Urban County Government ("LFUCG"), from enforcing recently enacted legislation which could be used to keep plaintiff Northern Kentucky Chiropractic ("NKC") from obtaining automobile accident reports to be used for purposes of commercial solicitation of business. Because we conclude that the district court abused its discretion in issuing the injunction, we **DISSOLVE** the injunction, and **REMAND** to the district court with instructions to conduct further proceedings not inconsistent with this order.

I.

There are few material background facts. On June 19, 1976, the Kentucky General Assembly enacted the Open Records Act. KY. REV. STAT. ANN. §§ 61.870-884 (Banks-Baldwin 1976) ("the Act"). The Act enabled individuals to inspect any "public record" within the custody and control of a "public agency," provided that the document was within the scope of the Act. As a result, numerous documents, once unavailable to the general public, were open for almost anyone to inspect for almost any purpose. NKC and other commercial interests often took advantage of the Act in order to identify potential clients for direct-mail solicitation of business.

As of January 1, 1977, Kentucky began to require motorists involved in certain types of automobile accidents to file accident reports with the Kentucky Department of State Police. KY. REV. STAT. ANN. § 189.635 (Banks-Baldwin 1977). Motorists are required to disclose in these reports certain personal information including, but not limited to, the driver's full name, birth date, address, driver's license number (which is the same as his or her social security number), physical infirmities which restrict the license, the vehicle's registration and insurance, the vehicle's identification number, passengers' names and addresses, witnesses' names and addresses, the types of injuries sustained by the victims and what medical facilities the victims were taken to, the use of drugs or alcohol, any physical disability that contributed to the accident, any criminal violations involved, and other information, including telephone numbers. These reports were initially made available to the public, including NKC, pursuant to the Act. NKC would make

copies of these reports in order to obtain the names and addresses of accident victims, which NKC would then use as part of its direct-mail efforts to solicit business.

In 1994, the Kentucky General Assembly amended § 189.635.[1] In its entirety, the language of the Amendment is as follows:

> [A]ll other accident reports required by this section,[2] and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the parents or guardians of a minor who is a party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.
>
> (6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's

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[1] We refer to § 189.635 as "the Amendment," "the statute," or simply § 189.635.

[2] The language of the amendment applies to all accident reports *except* those filed in compliance with subsection (4), which requires that any person involved in an accident resulting in damage exceeding $500.00 in which no investigation is conducted by a law enforcement officer file a report with the Department of State Police. KY. REV. STAT. ANN. § 189.635(4) (Banks-Baldwin 1994).

> publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

On July 15, 1994, in conformity with the Amendment, the LFUCG stopped releasing the accident reports to the public. On October 6, 1994, NKC sued defendant Steve Ramey in his official capacity as custodian of the records for the LFUCG. NKC attacked the Amendment on First Amendment grounds, insisting that it violated its right to receive copies of the accident reports.

On January 23, 1995, NKC filed a motion for a preliminary injunction. After a hearing at which it heard arguments of counsel but took no evidence, the district court issued a memorandum opinion in which it held that the Amendment unduly restricted NKC's commercial speech rights and was unconstitutional.[3] The district court enjoined Ramey from enforcing the Amendment.

II.

The narrow issue before us is the propriety of the district court's issuance of the preliminary injunction. We

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[3] The district court apparently judged the Amendment by the Supreme Court's *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), although the opinion does not cite to that case or discuss it. The court simply held that the restriction was not supported by a substantial governmental interest, and therefore, the statute was unconstitutional.

review a district court's decision to issue a preliminary injunction for abuse of discretion. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). Errors of law are considered an abuse of discretion. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir.1996).

Ordinarily, our inquiry in an appeal of a preliminary injunction would focus on the four factors courts must balance when deciding whether to issue a preliminary injunction. Specifically, we would consider: (1) whether the party seeking the injunction has shown a substantial likelihood of success on the merits; (2) whether the party seeking the injunction will suffer irreparable harm absent the injunction; (3) whether an injunction will cause others to suffer substantial harm; and (4) whether the public interest would be served by the issuance of the injunction. *See Southern Milk Sales v. Martin*, 924 F.2d 98, 103 n.1 (6th Cir.1991).

The record in this case, however, reveals that the district court did not undertake the required four-factor balancing of interests. Rather, after making a factual finding that an earlier preliminary injunction barring enforcement of this statute was then on appeal, the district court held that the statute is unconstitutional and, in an order captioned "Injunction," not "Preliminary Injunction," enjoined the statute's enforcement. The court did not follow the procedures provided by Rule 65 of the Federal Rules of Civil Procedure to consolidate the hearing on the motion for preliminary injunction with a trial on the merits, an avenue plainly available if the district court considered an expedited decision on the merits appropriate. As a result, the parties have not been afforded a full opportunity to present their cases, but the court, without

benefit of a fully developed record, has squarely held that the statute at issue is unconstitutional.

In our view, this alone constitutes an abuse of discretion. No authority of which we are aware expressly authorizes a district court to proceed, as the district court did here, to reach the merits of this case as part of its ruling on a motion for preliminary injunction. Indeed, the Supreme Court has made it clear that because of the nature and purpose of preliminary injunction proceedings,[4] "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (citations omitted).

Accordingly, we **VACATE** the injunction, and **REMAND** this case to the district court for further proceedings. We instruct the district court on remand carefully to develop the factual record and to address such issues, *inter alia*, as whether this statute should be analyzed as involving restriction on NKC's commercial speech, or whether the statute is more properly analyzed as involving simply a restriction on access to government-collected information, and if the latter, whether the press has any greater right of access to government records than has the public in general.

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[4] "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. . . . A party thus is not required to prove his case in full at a preliminary-injunction hearing." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

DAVID A. NELSON, Circuit Judge, concurring. I agree that it was an abuse of discretion for the district court to hold the Kentucky statute unconstitutional without benefit of a fully developed record. My purpose in writing separately is to note a second reason why, in my view, the district court ought not to have granted relief in response to the plaintiff's motion for a preliminary injunction: I think the plaintiff failed to show a substantial likelihood of success on the merits of its claim that the denial of access to the public records in question abridged its freedom of speech in violation of the First Amendment.

As Judge Ryskamp recently pointed out in *Babkes v. Satz*, 944 F.Supp. 909, 911 (S.D.Fla.1996), citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978), "there is no First Amendment guarantee of a right of access to government records. . . . " The First Amendment is not a Freedom of Information Act; generally speaking, at least, the United States Constitution leaves it to the several states to decide whether and to what extent state records shall be opened to inspection by the public.

The Florida statute at issue in the *Babkes* case – like the Maryland statute at issue in *Ficker v. Curran*, No. WMN-96-2057 (D.Md. 10/21/96) – restricted the *use* to which information regarding traffic offenses could be put. The district courts held that the restrictions were unconstitutional. These decisions are not directly in point here, because neither the Florida statute nor the Maryland statute dealt with *access* to government traffic accident reports.

Kentucky's statute imposes restrictions on the use to which traffic accident reports may be put by a "news-gathering organization," but not by anyone else. Plaintiff Northern Kentucky Chiropractic – unlike one of the plaintiffs in another lawsuit where the constitutionality of the Kentucky statute has been challenged, see *Amelkin v. McClure*, No. 94-6161 (6th Cir. 1/9/96) (slip opinion at 4, 1996 WL 8112 at *2) – does not claim to be a news-gathering organization, actual or prospective. As far as Northern Kentucky Chiropractic is concerned, therefore, the Kentucky statute purports to regulate access only. It does not purport to regulate the use to which the chiropractic firm can put such information as it may be able to obtain. On its face, in other words, the statute does not purport to regulate the firm's "speech."

It is doubtless true that by ending the practice of giving the general public access to accident reports, Kentucky made it much more difficult for Northern Kentucky Chiropractic to send targeted advertising materials to accident victims named in the reports. And if the Kentucky legislature had singled out advertisers such as Northern Kentucky Chiropractic for denial of access, a strong argument could be made that the statute should be analyzed as "a government erected obstruction to speech." See *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 n.2 (10th Cir.), *cert. denied*, 115 S.Ct. 638 (1994). The Kentucky statute does not single out advertisers, however; like the Louisiana statute at issue in *DeSalvo v. Louisiana*, 624 So.2d 897 (La.S.Ct.1993), *cert. denied*, 510 U.S. 1117 (1994), it "prohibits disclosure of state motor vehicle accident reports to *anyone* except a party to an accident, his or her representative, attorney and insurer,

[and] the press. . . . " *Id.* at 898 (emphasis supplied). As the Supreme Court of Louisiana observed in upholding the constitutionality of statutes of this type, "[a] less stringent test applies . . . when the regulation does not flatly prohibit or restrict commercial speech because of its content but indirectly results in a stricture upon the flow of information. . . . " *Id.* at 900.

Assuming, *arguendo*, that the constitutionality of the Kentucky statute ought to be analyzed under the test that would be applicable if Kentucky had chosen to withhold access only from those wishing to use the accident reports for commercial purposes, it seems to me that the Kentucky statute should still pass constitutional muster. See the well-reasoned majority opinion in *Lanphere & Urbaniak*, where the Tenth Circuit, using the analysis applied in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and distinguishing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), upheld the constitutionality of a Colorado statute denying access to criminal justice records where the records were "sought for the purpose of directly soliciting business for pecuniary gain." 21 F.3d at 1510.

I recognize that there are decisions pointing the other way. See, *e.g.*, *Speer v. Miller*, 15 F.3d 1007 (11th Cir.1994) (holding unconstitutional a Georgia statute that prohibited inspection or copying of law enforcement records for commercial solicitation) and *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir.1993) (holding unconstitutional a Texas statute prohibiting the use of accident report information for the purpose of soliciting business). But the Supreme Court's decision in *Florida Bar v. Went*

For It, Inc., 115 S.Ct. 2371 (1995), upholding the constitutionality of a prohibition against personal injury lawyers sending targeted advertising to accident victims within a period of 30 days after the accident, may suggest somewhat greater sympathy on the part of the Supreme Court for the position taken by the Tenth Circuit in *Lanphere & Urbaniak*. My own view, in any event, is that the Tenth Circuit got it right.

Guy, J., concurring. I agree that this matter needs to be remanded for the reasons set forth in Judge Batchelder's opinion. Unlike Judge Nelson, however, I have serious reservations about the constitutionality of the statute. Although the state does have a legitimate interest in protecting the privacy of its citizens relative to information they are compelled to divulge, the exception that allows the media to have access to this information makes the statute fatally flawed in my view. I hasten to add, however, that a fully developed record may convince me otherwise.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

STEPHEN AMELKIN, C.D., et al.,

Plaintiffs,

v.

JEFFERSON COUNTY, KENTUCKY, et al.,

Defendants.

CIVIL ACTION

No. C 95-22-L(A)

ORDER

Plaintiffs having filed a motion for class action certification, and there being no objection thereto,

IT IS ORDERED that all of the cities and counties of the Commonwealth of Kentucky which create and maintain records of traffic accidents are hereby certified as a defendant class pursuant to Fed.R.Civ.P. 23(b)(2).

Dated 2/10/95

/s/ Charles M. Allen
Charles M. Allen,
Senior Judge

cc: Counsel of Record

(Entered Febr. 10, 1995)

Stephen AMELKIN, D.C., et al., Plaintiffs,

v.

COMMISSIONER, DEPARTMENT OF STATE POLICE, et al., Defendants.

Stephen AMELKIN, D.C., et al., Plaintiffs,

v.

JEFFERSON COUNTY, KENTUCKY, et al., Defendants.

JUSTICE CABINET, Department of State Police, et al., Plaintiffs,

v.

David KAPLAN, Defendant.

Nos. 3:94CV-360-A, 3:95CV-22-A.

United States District Court,
W.D. Kentucky.

June 3, 1996.

Donald L. Cox, Lynch, Cox, Gilman & Mahan, Louisvlle, KY; and David A. Friedman, Taustine, Post, Sotsky, Berman, Fineman & Kohn, Louisville, KY, for plaintiffs.

Barbara Jones, Office of General Council, Corrections Cabinet, Frankfort, KY; Lucy B. Richardson, KY, Justice Cabinet, Frankfort, KY; William B. Pettus, Office of the Atty. General, Frankfort, KY; John L. Arnett, Elizabethtown, KY; N. Scott Lilly, First Assistant County Attorney, Louisville, KY, for defendants.

MEMORANDUM OPINION AND ORDER

ALLEN, Senior District Judge.

Defendants filed a motion to dismiss the pleadings filed by the plaintiffs. The motion was based on the principle that if there is a constitutional challenge to a statute, and there is a way in which the case may be decided without resorting to the decision of the constitutional issue, then the constitutional issue should be avoided. While this is an accurate recitation of the theory, it is not applicable in the case at bar. The issue presented by the plaintiffs is the constitutionality of a policy of restricting access to accident reports on the basis of the purpose for which they are sought. Whether the distinction between those in the position of plaintiffs and those in the position of news gatherers or insurance statisticians is based on Chapter 189 or Chapter 61 or another chapter altogether, the constitutional question remains and we are not free to avoid its decision.

Therefore, the motion to dismiss will be overruled.

IT IS SO ORDERED.

96-5942

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN AMELKIN, BROADWAY CHIROPRACTIC, ET AL.,	)	ORDER
Plaintiffs-Appellees,	)	(Filed April 30, 1999)
CITY OF LOUISVILLE, DIVISION OF POLICE,	)	
Plaintiff,	)	
v.	)	
ANN MCCLURE, DOCUMENT CUSTODIAN, ET AL.,	)	
Defendants-Appellants,	)	
JUSTICE CABINET, DEPARTMENT OF STATE POLICE,	)	
Plaintiff/Counter Defendant-Appellant.	)	

BEFORE: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

AMENDMENTS TO THE UNITED STATES CONSTITUTION

AMENDMENTS I-X – BILL OF RIGHTS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART 1 – CRIMES
CHAPTER 123 – PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR VEHICLE RECORDS

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In general. – Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.

(b) Permissible uses. – Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and may be disclosed as follows:

(1) for use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a

Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions, motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only –

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information

is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

(12) For bulk distribution for surveys, marketing or solicitations if the motor vehicle department has implemented methods and procedures to ensure that –

(A) individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses; and

(B) the information will be used, rented, or sold solely for bulk distribution for surveys, marketing, and solicitations, and that surveys, marketing and solicitations will not be directed at those individuals who have requested in a timely fashion that they not be directed at them.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or redisclosure. – An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver procedures. – A state motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

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§ 2722. Additional unlawful acts

(a) Procurement for unlawful purpose. – It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False representation. – It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

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§ 2723. Penalties

(a) Criminal fine. – A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State department of motor vehicles. – Any State department of motors vehicles that has a policy

or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

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§ 2724. Civil action

(a) Cause of action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

<See also amendment set out after text>

HISTORICAL AND STATUTORY NOTES

Effective Date

Section effective on the date which is 3 years after Sept. 13, 1994, provided that, after such effective date, if a

State has implemented a procedure under section 2721(b)(11) and (12) of this title for prohibiting disclosures or uses of personal information, and the procedure otherwise meets the requirements of such subsection (b)(11) and (12), the State shall be in compliance with such subsection even if the procedure is not available to individuals until they renew their license, title, registration or identification card, so long as the State provides some other procedure for individuals to contact the State on their own initiative to prohibit such uses or disclosures and provided further, that prior to such effective date, personal information covered by this chapter may be released consistent with State law or practice, see section 300003 of Pub.L. 103-322, set out as a note under section 2721 of this title.

[LOGO]

GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY
REGULAR SESSION 1994

SENATE BILL NO. 351

(AS ENACTED)

WEDNESDAY, MARCH 30, 1994

AN ACT relating to motor vehicle accidents.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1 KRS 189.635 is amended to read as follows:

(1) The Justice Cabinet, Department of State Police, shall be responsible for maintaining a reporting system for all vehicle accidents which occur within the Commonwealth. Such accident reports shall be utilized for such purposes as will improve the traffic safety program in the Commonwealth involving the collection, processing, storing, and dissemination of such data and the establishment of procedures by administrative regulations to insure that uniform definitions, classifications, and other federal requirements are in compliance.

(2) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in fatal or nonfatal personal injury to any person or damage to the vehicle rendering the vehicle inoperable shall be required to immediately notify a law enforcement officer having jurisdiction. In the event

the operator fails to notify or is incapable of notifying a law enforcement officer having jurisdiction, such responsibility shall rest with the owner of the vehicle or any occupant of the vehicle at the time of the accident. A law enforcement officer having jurisdiction shall investigate the accident and file a written report of the accident with his law enforcement agency.

(3) Every law enforcement agency whose officers investigate a vehicle accident of which a report must be made as required in this chapter shall file a report of the accident with the Department of State Police within ten (10) days after investigation of the accident upon forms supplied by the department.

(4) Any person operating a vehicle on the highways of this state who is involved in an accident resulting in any property damage exceeding five hundred dollars ($500) in which an investigation is not conducted by a law enforcement officer shall file a written report of the accident with the Department of State Police within ten (10) days of occurrence of the accident upon forms provided by the department.

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in an accident when his identity is not otherwise known or when he denies his presence at an accident. ***All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be made available only to the parties to the accident, the***

parents or guardians of a minor who is party to the accident and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

(6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

KY Statutes, T. VIII, Ch. 61, OPEN RECORDS

KY ST. T. VIII, Ch. 61, References and Annotations

61.870 DEFINITIONS FOR KRS 61.872 TO 61.884

61.871 POLICY OF KRS 61.870 TO 61.884; STRICT CONSTRUCTION OF EXCEPTIONS OF KRS 61.878

61.8715 LEGISLATIVE FINDINGS

61.872 RIGHT TO INSPECTION; LIMITATION

61.874 ABSTRACTS, MEMORANDA, COPIES; AGENCY MAY PRESCRIBE FEE; USE OF NONEXEMPT PUBLIC RECORDS FOR COMMERCIAL PURPOSES; ONLINE ACCESS

61.8745 DAMAGES RECOVERABLE BY PUBLIC AGENCY FOR PERSON'S MISUSE OF PUBLIC RECORDS

61.876 AGENCY TO ADOPT RULES AND REGULATIONS

61.878 CERTAIN PUBLIC RECORDS EXEMPTED FROM INSPECTION EXCEPT ON ORDER OF COURT; RESTRICTION OF STATE EMPLOYEES TO INSPECT PERSONNEL FILES PROHIBITED

61.880 DENIAL OF INSPECTION; ROLE OF ATTORNEY GENERAL

61.882 JURISDICTION OF CIRCUIT COURT IN ACTION SEEKING RIGHT OF INSPECTION; BURDEN OF PROOF; COSTS; ATTORNEY FEES

61.884 PERSON'S ACCESS TO RECORD RELATING TO HIM

61.8715 Legislative findings.

The General Assembly finds an essential relationship between the intent of this chapter and that of KRS 171.410

to 171.740, dealing with the management of public records, and of KRS 61.940 to 61.957, dealing with the coordination of strategic planning for computerized information systems in state government; and that to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to the requirements of these statutes. The General Assembly further recognizes that while all government agency records are public records for the purpose of their management, not all these records are required to be open to public access, as defined in this chapter, some being exempt under KRS 61.878.

61.872 Right to inspection – Limitation.

(1) All public records shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 61.884, and suitable facilities shall be made available by each public agency for the exercise of this right. No person shall remove original copies of public records from the offices of any public agency without the written permission of the official custodian of the record.

(2) Any person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, describing the records to be inspected. The application shall be hand delivered, mailed, or sent via facsimile to the public agency.

(3) A person may inspect the public records:

(a) During the regular office hours of the public agency; or

(b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

(4) If the person to whom the application is directed does not have custody of control of the public record requested, that person shall notify the applicant and shall furnish the name and location of the official custodian of the agency's public records.

(5) If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not in exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection.

(6) If the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies

thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

61.874 Abstracts, memoranda, copies – Agency may prescribe fee – Use of nonexempt public records for commercial purposes – Online access.

(1) Upon inspection, the applicant shall have the right to make abstracts of the public records and memoranda thereof, and to obtain copies of all public records not exempted by the terms of KRS 61.878. When copies are requested, the custodian may require a written request and advance payment of the prescribed fee, including postage where appropriate. If the applicant desires copies of public records other than written records, the custodian of the records shall duplicate the records or permit the applicant to duplicate the records; however, the custodian shall ensure that such duplication will not damage or alter the original records.

(2) (a) Nonexempt public records used for noncommercial purposes shall be available for copying in either standard electronic or standard hard copy format, as designated by the party requesting the records, where the agency currently maintains the records in electronic format. Nonexempt public records used for noncommercial purposes shall be copied in standard hard copy format where agencies currently maintain records in hard copy format. Agencies are not required to convert hard copy format records to electronic formats.

(b) The minimum standard format in paper form shall be defined as not less than 8½ inches x 11 inches in at least one (1) color on white paper, or for electronic format, in a flat file electronic American Standard Code for Information Interchange (ASCII) format. If the public agency maintains electronic public records in a format other than ASCII, and this format conforms to the requestor's requirements, the public record may be provided in this alternate electronic format for standard fees as specified by the public agency. Any request for a public record in a form other than the forms described in this section shall be considered a nonstandardized request.

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required. If a public agency is asked to produce a record in a nonstandardized format, or to tailor the format to meet the request of an individual or a group, the public agency may at its discretion provide the requested format and recover staff costs as well as any actual costs incurred.

(4) (a) Unless an enactment of the General Assembly prohibits the disclosure of public records to persons who intend to use them for commercial purposes, if copies of nonexempt public records are requested for commercial purposes, the public agency may establish a reasonable fee.

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

(c) The fee provided for in subsection (a) of this section may be based on one or both of the following:

1. Cost to the public agency of media, mechanical processing, and staff required to produce a copy of the public record or records;

2. Cost to the public agency of the creation, purchase, or other acquisition of the public records.

(5) It shall be unlawful for a person to obtain a copy of any part of a public record for a:

(a) Commercial purpose, without stating the commercial purpose, if a certified statement from the requestor was required by the public agency pursuant to subsection (4)(b) of this section; or

(b) Commercial purpose, if the person uses or knowingly allows the use of the public record for a different commercial purpose; or

(c) Noncommercial purpose, if the person uses or knowingly allows the use of the public record for a commercial purpose. A newspaper, periodical, radio or television station shall not be held to have used or knowingly allowed the use of the public record for a commercial purpose merely because of its publication or broadcast,

unless it has also given its express permission for that commercial use.

(6) Online access to public records in electronic form, as provided under this section, may be provided and made available at the discretion of the public agency. If a party wishes to access public records by electronic means and the public agency agrees to provide online access, a public agency may require that the party enter into a contract, license, or other agreement with the agency, and may charge fees for these agreements. Fees shall not exceed:

(a) The cost of physical connection to the system and reasonable cost of computer time access charges; and

(b) If the records are requested for a commercial purpose, a reasonable fee based on the factors set forth in subsection (4) of this section.

61.8745 Damages recoverable by public agency for person's misuse of public records.

A person who violates subsections (2) to (6) of KRS 61.874 shall be liable to the public agency from which the public records were obtained for damages in the amount of:

(1) Three (3) times the amount that would have been charged for the public record if the actual commercial purpose for which it was obtained or used had been stated;

(2) Costs and reasonable attorney's fees; and

(3) Any other penalty established by law.

61.878 Certain public records exempted from inspection except on order of court – Restriction of state employees to inspect personnel files prohibited.

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

(b) Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute;

(c) 1. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;

2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

a. In conjunction with an application for or the administration of a loan or grant;

b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;

c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulac, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or

d. For the grant or review of a license to do business.

3. The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or publication of which is directed by another statute;

(d) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection;

(e) Public records which are developed by an agency in conjunction with the regulation or

supervision of financial institutions, including but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods;

(f) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to acquisition of property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision;

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again;

(h) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall

remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884;

(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;

(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;

(k) All public records or information the disclosure of which is prohibited by federal law or regulation; and

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.

(2) No exemption in this section shall be construed to prohibit disclosure of statistical information not descriptive of any readily identifiable person.

(3) No exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him. The records shall include, but not be limited to, work plans, job performance, demotions, evaluations, promotions, compensation, classification, reallocation, transfers, layoffs, disciplinary actions, examination scores, and preliminary and

other supporting documentation. A public agency employee, including university employees, applicant, or eligible shall not have the right to inspect or to copy any examination or any documents relating to ongoing criminal or administrative investigations by an agency.

(4) If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.

(5) The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function.

61.880 Denial of inspection – Role of Attorney General.

(1) If a person enforces KRS 61.870 to 61.884 pursuant to this section, he shall begin enforcement under this subsection before proceeding to enforcement under subsection (2) of this section. Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period, of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific

exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

(2) (a) If a complaining party withes the Attorney General to review a public agency's denial of a request to inspect a public record, the complaining party shall forward to the Attorney General a copy of the written request and a copy of the written response denying inspection. If the public agency refuses to provide a written response, a complaining party shall provide a copy of the written request. The Attorney General shall review the request and denial and issue within twenty (20) days, excepting Saturdays, Sundays and legal holidays, a written decision stating whether the agency violated provisions of KRS 61.870 to 61.884,

(b) In unusual circumstances, the Attorney General may extend the twenty (20) day time limit by sending written notice to the complaining party and a copy to the denying agency, setting forth the reasons for the extension, and the day on which a decision is expected to be issued, which shall not exceed an additional thirty (30) work days, excepting Saturdays, Sundays, and legal holidays. As used in this section, "unusual circumstances" means, but only to the extent reasonably necessary to the proper resolution of an appeal:

1. The need to obtain additional documentation from the agency or a copy of the records involved;

2. The need to conduct extensive research on issues of first impression; or

3. An unmanageable increase in the number of appeals received by the Attorney General.

(c) On the day that the Attorney General renders his decision, he shall mail a copy to the agency and a copy to the person who requested the record in question. The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation. The Attorney General may also request a copy of the records involved but they shall not be disclosed

(3) Each agency shall notify the Attorney General of any actions filed against that agency in Circuit Court regarding the enforcement of KRS 61.870 to 61.884. The Attorney General shall not however, be named as a party in any Circuit Court actions regarding the enforcement of KRS 61.870 to 61.884, nor shall he have any duty to defend his decision in Circuit Court or any subsequent proceedings.

(4) If a person feels the intent of KRS 61.870 to 61.884 is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General, and the complaint shall be subject to the same adjudicatory process as if the record had been denied.

(5) (a) A party shall have thirty (30) days from the day that the Attorney General renders his decision to appeal the decision. An appeal within the thirty (30) day time limit shall be treated as if it were an action brought under KRS 61.882.

(b) If an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision

shall have the force and effect of law and shall be enforceable in the Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained.

61.882 Jurisdiction of Circuit Court in action seeking right of inspection – Burden of proof – Costs – Attorney fees.

(1) The Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained shall have jurisdiction to enforce the provisions of KRS 61.870 to 61.884, by injunction or other appropriate order on application of any person.

(2) A person alleging a violation of the provisions of KRS 61.870 to 61.884 shall not have to exhaust his remedies under KRS 61.880 before filing suit in a Circuit Court.

(3) In an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to KRS 61.880(5)(a), the court shall determine the matter de novo. In an original action or an appeal of an Attorney General's decision, where the appeal is properly filed pursuant to KRS 61.880(5)(a), the burden of proof shall be on the public agency. The court on its own motion, or on motion of either of the parties, may view the records in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

(4) Except as otherwise provided by law or rule of court, proceedings arising under this section take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date.

(5) Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect or copy said public record. Attorney's fees costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.

Office of the Attorney General
Commonwealth of Kentucky

TO BE PUBLISHED
95-ORD-151
October 27, 1995
In re: Keith Page/Kentucky Transportation Cabinet

OPEN RECORDS DECISION

This appeal originated in the submission of a request for public records by Keith Page, a private investigator from Urbandale, Iowa, to the Kentucky Transportation Cabinet. Mr. Page was retained by Mark Calvert, of Des Moines, Iowa, to locate the owner of a vehicle registered in Kentucky, which was being driven by another individual when it struck Mr. Calvert's vehicle. The driver, Mr. Page advises, "has basically admitted liability," but refuses to make a reasonable settlement offer. Accordingly, Mr. Calvert wishes to contact the registered owner "to effect insurance claims."

On June 16, 1995, Mr. Page, acting on Mr. Calvert's behalf, submitted a request to the Transportation Cabinet for copies of motor vehicle registration records and records reflecting insurance coverage. On the same date, Jon D. Clark, Commissioner for the Department of Administrative Services, responded to Mr. Page's letter, advising him that the information he requested was being released to him. However, Commissioner Clark noted, the owner's address, birthdate, and social security number would be masked pursuant to KRS 61.878(1)(a), which excludes from the application of the Open Records Act, "Public records containing information of a personal

nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." In addition, Commissioner Clark advised Mr. Page that records relating to insurance coverage should be directed to the McCracken County Clerk's Office. This appeal followed.

We are asked to determine if the Kentucky Transportation Cabinet violated provisions of the Open Records Act by partially denying Mr. Page's request. For the reasons set forth below, we conclude that the Cabinet properly withheld the social security number and birthdate of the vehicle's owner, as well as her home address. Disclosure of these items of information, under the facts presented, would constitute a clearly unwarranted invasion of personal privacy.

In an early open records decision, the Kentucky Court of Appeals developed a standard by which to judge the propriety of an agency's invocation of the personal privacy exemption codified at KRS 61.878(1)(a). *Board of Education of Fayette County v. Lexington-Fayette Urban County Human Rights Commission*, Ky.App., 625 S.W.2d 109 (1981). At page 111 of that decision, the court observed:

> [W]e should point out that we do not subscribe to the tilting toward disclosure doctrine [adopted by the federal courts] but rather apply the test of balancing the interests of the parties as well as those of the public measured by the standard of a reasonable man.

The court thus recognized that "we must treat these actions on a case by case basis." *Board of Education* at 111.

The Kentucky Supreme Court revisited this issue in 1992, refining the standard set forth in *Board of Education* and departing, at least in part, from that decision by establishing that the Open Records Act does, in fact, "exhibit [ ] a general bias favoring disclosure." *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Co., Ky.*, 826 S.W.2d 324, 327 (1992). The court began its analysis with the proposition that "[t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory function." Continuing, the court observed:

> In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good.

Id.

The court also recognized that the existence of the privacy exemption "reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny." *Board of Examiners* at 327.

Drawing on these fundamental principles, the court articulated the following standard for determining if a record may properly be excluded from public inspection pursuant to KRS 61.878(1)(a):

> [G]iven the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the

> public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance. The statute contemplates a case- specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context.

Board of Examiners at 327-328.

In closing, the court admonished that "the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity. . . . "

In *Zink v. Commonwealth of Kentucky,* Ky.App., 902 S.W.2d 825 (1994), the Court of Appeals was again presented with a challenge to an agency's invocation of the personal privacy exemption. Echoing the rule announced in Board of Examiners, the court elaborated on its "mode of decision":

> [O]ur analysis begins with a determination of whether the subject information is of a "personal nature." If we find that it is, we must then determine whether public disclosure "would constitute a clearly unwarranted invasion of personal privacy." This latter determination entails a "comparative weighing of antagonistic interests" in which the privacy interest in non-disclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good. [*Board of Examiners*] at 327.

release would be "no less intrusive" than the release of home addresses and telephone numbers. As we have noted, the court ultimately held that because the privacy interests of the individuals who were the subjects of the requested records "substantially outweights [sic] the negligible Open Records Act related public interest in disclosure," *id.*, disclosure would constitute a clearly unwarranted invasion of personal privacy. Applying the same test to the facts before us, we reach the same conclusion.

Mr. Page is an investigator retained by Mark Calvert to locate the owner of a vehicle which collided with Mr. Calvert's vehicle. Because he will receive a fee or commission for his services, the use to which Mr. Page intends to put the information contained in the requested records must be considered a commercial one. KRS 61.870(4)(a). Had Mr. Calvert requested access to the same records, our conclusion would not be altered. In both instances, we can discern very little, if any, public interest which would be served by disclosure. As in *Zink*, release of the information sought would not further the citizens' right to monitor public agency action. And, as in *Zink*, while there may be some merit to Mr. Page's assertion that the public interest would be served "by insuring that a Kentucky resident cannot 'thumb their [sic] nose' at the system," this is not the public interest which the law was enacted to insure. "The relevant public interest supporting disclosure [both here and in Zink] is nominal at best." *Zink* at 829.

The competing privacy interests are, as the *Zink* court observed, weighty indeed. Not just in Kentucky, but

throughout the United States, courts have long recognized a basic privacy interest in one's own house, characterizing that interest as "modest, but not compelling," American Federation of Government Employees, *Local 1760 v. Federal Labor Relations Authority*, 786 F.2d 554, 556-57 (2d Cir. 1986); "cognizable," *Heights Community Congress* at 529; "a meaningful interest . . . which merits some protection," *United States Department of the Navy v. FLRA*, 840 F.2d 1131 (3rd Cir. 1988); "significant," *Aronson v. I.R.S.*, 767 F.Supp.378 (D. Mass. 1991), *reversed on other grounds Aronson v. I.R.S.*, 973 F.2d 962 (1st Cir. 1992); and "a strong . . . interest," *Wine Hobby USA, Inc. v. United States IRS*, 502 F.2d 133, 136-137 (3rd Cir. 1974). Thus, although the courts have demonstrated differing degrees of sensitivity to the disclosure of home addresses, they are uniform in recognizing that there is a privacy interest at stake. As noted, Kentucky's Court of Appeals has determined that a home address is information which an individual "may fervently wish to remain confidential or only selectively released." *Zink* at 829.

Similarly, the courts have consistently recognized that individuals have a strong privacy interest in social security numbers. In a non-freedom of information case, the Fourth Circuit analyzed in considerable depth the evolution of the use, and the growing concern about the misuse, of social securtiy [sic] numbers. *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993). We borrow liberally from the Fourth Circuit's analysis:

> Originated in 1936, a SSN is a nine-digit account number assigned by the Secretary of Health and Human Services for the purpose of administering the Social Security laws. *See* 42

U.S.C. § 405(c)(2)(B). SSNs were first intended for use exclusively by the federal government as a means of tracking earnings to determine the amount of Social Security taxes to credit to each worker's account. Over time, however, SSNs were permitted to be used for purposes unrelated to the administration of the Social Security system. For example in 1961, Congress authorized the Internal Revenue Service to use SSNs as taxpayer identification numbers. Pub.L. No. 87-397, 75 Stat. 828 (codified as amended at 26 U.S.C. §§ 6113, 6676).

In response to growing concerns over the accumulation of massive amounts of personal information, Congress passed the Privacy Act of 1974. This Act makes it unlawful for a governmental agency to deny a right, benefit, or privilege merely because the individual refuses to disclose his SSN. In addition, Section 7 of the Privacy Act further provides that any agency requesting an individual to disclose his SSN must "inform that individual whether that disclosure is mandatory or voluntary, by what statutory authority such number is solicited, and what uses will be made of it." At the time of its enactment, Congress recognized the dangers of widespread use of SSNs as universal identifiers. In its report supporting the adoption of this provision, the Senate Committee stated that the widespread use of SSNs as universal identifiers in the public and private sectors is "one of the most serious manifestations of privacy concerns in the Nation." S.Rep. No. 1183, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6916, 6943. In subsequent decisions, the Supreme Court took notice of the serious threats to privacy interests by the mass

accumulation of information in computer data banks. For example, in *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), in rejecting a privacy challenge to a New York statute that: (1) required doctors to disclose to the state information about prescriptions for certain drugs with a high potential for abuse and (2) provided for the storage of that information in a centralized computerized file, the Court observed:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of all criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

Id. at 605, 97 S.Ct. at 879 (footnote omitted).

Since the passage of the Privacy Act, an individual's concern over his SSN's confidentiality and misuse has become significantly more compelling. For example, armed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck. Elizabeth

> As the Supreme Court noted, the circumstances of a given case will affect the balance. *Id.* at 328.

Zink at 828. Applying this standard, the court concluded that the Commonwealth of Kentucky, Department of Workers Claims, properly denied an attorney, who admitted that he intended to use the records for direct mail solicitation, access to injury report forms filed with the Department, which contained marital status, number of dependents, wage rate, social security number, home address, and telephone number pursuant to KRS 61.878(1)(a). It is instructive to examine this decision at some length.

The Court of Appeals first recognized that the information which appears on the injury report forms is "generally accepted by society as details in which an individual has at least some expectation of privacy." *Zink* at 828. Rejecting the requester's argument that the same information is contained in other public documents which are available for public inspection, such as police accident reports, the court, citing OAG 76-511, reasoned that "when an individual enters on the public way, breaks a law, or inflicts a tort on his fellow man he forfeits his privacy to a certain extent." *Id.* Similarly, the court rejected the argument that information such as telephone numbers and home addresses are frequently available through telephone directories and voter registration lists, noting that "[w]e deal . . . not in total nondisclosure, but with an individual's interest in selective disclosure." *Id.*

Turning to the issue of whether an invasion of privacy is warranted by weighing the public interest in disclosure against the privacy interests involved, the

court first established that its analysis "does not turn on the purposes for which the request for information is made or the identity of the person making the request." *Zink* at 828. The court amplified on this position:

> We think the Legislature clearly intended to grant any member of the public as much right to access to information as the next. [Footnote omitted.] While binding precedent has yet to clearly speak to the point, we believe that the only relevant public interest in disclosure to be considered is the extent to which disclosure would serve the principle [sic] purpose of the Open Records Act. This is the approach the United States Supreme Court has taken in a similar analysis of requests under the Freedom of Information Act (FOIA). *See Dept. Of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774-75. 109 S.Ct. 1468, 1482-83, 103 L.Ed.2d 774, 796-97 (1989). As stated in *Board of Examiners, supra*, "[t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good." 826 S.W.2d at 328. At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing. That purpose is not fostered however by disclosure of information about private citizens that is accumulated in various government files that reveals little or nothing about an agency's own conduct. The relevant public interest supporting disclosure in this instance is

> nominal at best. Disclosure of the information appellant seeks would do little to further the citizens' right to know what their government is doing and would not in any real way subject agency action to public scrutiny. While there may be some merit to appellant's assertion that the broad public interest would be served by the dissemination of information to injured workers regarding their legal rights under the workers' compensation statutes, this cannot be said to further the principal purposes of the Open Records Act.

Zink at 828, 829. In a footnote, the court acknowledged that KRS 61.874 requires an individual requesting records for a commercial purpose to state that purpose, and authorizes a different fee for reproduction in these instances, and that KRS 61.872(6) permits an agency to deny inspection of records upon clear and convincing evidence that repeated requests are intended to disrupt essential functions of the agency. *Zink* at 828, n.1. These provisions did not alter its conclusion that the only relevant public interest is the extent to which disclosure would serve the principal purpose of the Open Records Act "to further the citizens' right to know what their government is doing and . . . subject agency action to public scrutiny." *Zink* at 829.

Against what it denominated a de minimis public interest, the court weighed the privacy interests of the injured workers who were the subjects of the records in the personal information in those records. With respect to home addresses and telephone numbers, the court was guided by the Sixth Circuit Court of Appeals decision in *Heights Community Congress v. Veterans Administration*, 732

F.2d 526 (6th Cir. 1984), *cert. den.*, 469 U.S. 1034, 105 S.Ct. 506, 83 L.Ed. 2d 398 (1984). Citing that decision, the court recognized:

> "There are few things which pertain to an individual in which his privacy has traditionally been more respected than his own home." [Citation omitted.] The importance of the right to privacy in one's address is evidenced by the acceptance within society of unlisted telephone numbers, by which subscribers may avoid publication of an address in the public directory, and postal boxes, which permit the receipt of mail without disclosing the location of one's residence. These current manifestations of the ancient maxim that 'a man's home is his castle' [citation omitted] support the . . . important privacy interest in the addresses sought.

Heights Community Congress at 529, cited in *Zink* at 829. Reiterating that "[o]ne of our most time honored rights is the right to be left alone . . . ," *Zink* at 829, and that a home address and telephone number are items of information that an individual "may fervently wish to remain confidential or only selectively released," *id.*, the court expressed its reluctance "to denigrate the sanctity of the home, that place in which an individual's privacy has long been steadfastly recognized by our laws and customs." *Id.*

The Court adopted a similar approach to social security numbers, which it characterized as "[t]hose nine digits [which] represent no less than the keys to an information kingdom as it relates to any given individual." Noting that social security numbers are "commonly treated circumspectly," *id.*, the court concluded that their

The answer is a simple one. Kentucky's courts have directed that those portions of public records containing information in which an individual has cognizable privacy interest may be withheld if there is no public interest in disclosure. That is to say, if disclosure "would do little to further the citizens' right to know what their government is doing and would not in any way subject agency action to public scrutiny," *Zink* at 829, the privacy interest in those discreet portions of public records is superior. As the court noted at page 829 of the Zink decision, "[o]ne of our most time-honored rights is the right to be left alone. . . ." While the particular facts of this appeal may not be the most compelling for purposes of vindicating this principle,[2] we take our cue from the courts as they have construed the privacy exemption over time, and refined the test for determining the propriety of nondisclosure under that exception. We affirm the actions of the Transportation Cabinet.

A party agrieved by this decision may appeal it by initiating action in the appropriate circuit court. Pursuant to KRS 61.880(3), the Attorney General shall be notified of

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[2] It should be noted that in enacting the Drivers Privacy and Protection Act, 18 U.S.C. § 2721, Congress has recognized that a state department of motor vehicles must disclose personal information on a motor vehicle record "in connection with matters of motor vehicle or driver safety and theft . . . ," 18 U.S.C. § 2721(b), and may disclose the same information for fourteen enumerated uses set forth in the statute. That Act will take effect three years after September 13, 1994. Ky. Op. Atty. Gen. 95-ORD-151.

any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

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Commonwealth of Kentucky

TO BE PUBLISHED
95-ORD-153
October 31, 1995

In re: Louanne S. Love/Jefferson County Department of Animal Control

OPEN RECORDS DECISION

This matter comes to the Attorney General on appeal from the Jefferson County Department of Animal Control's denial of Louanne S. Love's July 10, 1995, request for a copy of "[c]urrent Jefferson County animal licensure records including name and address of owner and breed and age of dog or cat." Ms. Love, who represents Dr. Damon Campbell, DVM, acknowledges that her client intends to use the information contained in the records for commercial purposes. Specifically, Dr. Campbell wishes to send out mailings to prospective clients.

On behalf of the Department of Animal Control, Jack R. Underwood, Jr., Assistant Jefferson County Attorney, denied Ms. Love's request on July 18, 1995. He explained:

> The Department of Animal Control's licensees are licensed solely as private individuals, and not for commercial or professional purposes. Therefore, and pursuant to the privacy exemption of the Open Records Act, it is the position of the Jefferson County Attorney's office that the addresses of Animal Control's licensees are protected from disclosure.
>
> Furthermore, there are specific procedures set forth in KRS 61.960, et seq. for obtaining a

> copy of a governmental data base with which you have not complied.

In response to Ms. Love's statement that her client received the same information a few years ago, Mr. Underwood noted that his review disclosed that this has been a long-standing policy, and he is aware of no instance where the Department has authorized release of these records to any individual, including Dr. Campbell.

In her letter of appeal, Ms. Love argues:

> I fail to see how a voluntary license, whether it be for a profession, car, boat, gun or dog, can be considered private. Certainly the information contained in applications for animal licenses is personal in the broadest sense (name, address, name of dog, etc.), but no more personal than car license records, which have been accessed by another of my clients.

Relying on OAG 90-142 and OAG 91-202, she maintains that licensure records of all types are open to the public. Alternatively, she asserts that if there is a cognizable privacy interest in the animal licensure records, the Department has not met its burden of proof by establishing that disclosure would constitute a clearly unwarranted invasion of that interest.

The question presented in this appeal is whether the Jefferson County Department of Animal Control violated the provisions of the Open Records Act by denying Ms. Love's request for animal licensure records. For the reasons set forth below, we conclude that the Department properly withheld the requested records. Disclosure of the information contained in these records, under the

> Neuffer, Victims Urge Crackdown on Identity Theft, BOSTON GLOBE, July 9, 1991, at 13, 20 (In Massachusetts, "[a]uthorities say that, with another person's Social Security number, a thief can obtain that person's welfare benefits, Social Security benefits, credit cards or even the victim's paycheck."); Michael Quint, Bank Robbers' Latest Weapon: Social Security Numbers, N.Y. Times, September 27, 1992, at 7 (SSN can be used to order new checks at a new address). [Footnote omitted.] In California, reported cases of fraud involving the use of SSNs have increased from 390 cases in 1988 to over 800 in 1991. Y. Anwar, Thieves Hit Social Security Numbers, San Francisco Chronicle, August 30, 1991, A1, A2. Succinctly stated, the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous. These are just examples, and our review is by no means exhaustive; we highlight a few to elucidate the egregiousness of the harm. [Footnote omitted.]

Greidinger at 1352-54. *See also, Yeager v. Hackensack Water Co.*, 615 F.Supp. 1087 (D.C.N.J. 1985); *I.B.E.W. Local Union No. 5 v. U.S. Dept. Of Housing and Urban Development*, 852 F.2d 87 (3rd Cir. 1988); *Oliva v. United States*, 756 F.Supp. 105 (E.D. N.Y. 1991). The Kentucky General Assembly recently recognized the sensitive nature of social security numbers by amending KRS 186.412(2), relating to drivers licensing, to require the use of a numbering system that uses an identifier other than social security numbers. And, of course, the Kentucky Court of Appeals has characterized them as "the keys to an information kingdom. . . . " *Zink* at 829. Simply stated, the privacy interest in a social security number is substantial.

Mirroring the Supreme Court's view in *Board of Examiners, supra,* the *Zink* court established a bright line test for determining if a public agency's invocation of the privacy exemption was proper on the facts presented. If the nature of the request is unrelated to the fundamental purpose of the Open Records Act, then countervailing interests, such as privacy, must prevail. Given the cognizable privacy interest of the vehicle owner in the non-disclosure of her home address and social security number, and the absence of any public interest, i.e., an interest that will advance the purpose of the Act by exposing public agency action to public scrutiny, we find that the privacy interests outweigh the non-open records act related public interest in disclosure. Accordingly, the Transportation Cabinet properly denied Mr. Page access to the vehicle owner's home address and social security number.[1]

Thus the debate which rages across the nation has come to rest in Kentucky. The questions raised are troubling ones – anonymity versus privacy, protection from government versus protection from our fellow citizens. In what conduct and transaction with the government may a private citizen enjoy a reasonable expectation of privacy, and does society recognize this expectation as reasonable? Lurking in the background, we hear the familiar "status quo" argument: If these records were available in the past, why are they unavailable now?

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[1] Although Mr. Page did not object to the redaction of the vehicle owner's birthdate, we would reach the same conclusion with respect to this item of information were the issue before us.

facts presented, would constitute a clearly unwarranted invasion of personal privacy. KRS 61-878(1)(a).

In a recent decision, this office analyzed in considerable depth the propriety of a public agency's invocation of KRS 61.878(1)(a), the privacy exception, to support its denial of a request for public records by a requester whose stated purpose was a commercial one. 95-ORD-151. There, we concluded that in view of the negligible Open Records Act related public interest in disclosure, the agency's reliance on the privacy exception was justified. A copy of that decision is attached hereto, and incorporated by reference. We believe that 95-ORD-151, is dispositive of the instant appeal.

In 95-ORD-151, the Attorney General surveyed the evolution of the privacy exception, culminating in the Court of Appeals' recent decision in *Zink v. Commonwealth of Kentucky*, Ky.App., 902 S.W.2d 825 (1984). Finding that information such as home address, telephone number, and social security number is "generally accepted by society as details in which an individual has at least some expectation of privacy." *Zink* at 828, the *Zink* court focused on the second part of the two part privacy analysis: Whether an invasion of this privacy interest is warranted by a superior public interest in disclosure. The court observed:

> While binding precedent has yet to clearly speak to the point, we believe that the only relevant public interest in disclosure to be considered is the extent to which disclosure would serve the principle purpose of the Open Records Act. This is the approach the United States Supreme Court has taken in a similar analysis of

> requests under the Freedom of Information Act (FOIA). See *Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774-75. 109 S.Ct. 1468, 1482-83, 103 L.Ed.2d 774, 796-97 (1989). As stated in Board of Examiners [of *Psychologists v. Courier-Journal and Louisville Times Co., Ky.*, 826 S.W.2d 324, 327 (1992)], "[t]he public's 'right to know' under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good." 826 S.W.2d at 328. At its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing. That purpose is not fostered however by disclosure of information about private citizens that is accumulated in various government files that reveals little or nothing about an agency's own conduct.

Zink at 828, 829. In construing the *Zink* opinion, this office recognized that, "[i]f the nature of the request is unrelated to the fundamental purpose of the Open Records Act, then countervailing interests, such as privacy, must prevail." 95-ORD-151, p. 9. Thus, what may have been implicit in the law before *Zink*, is explicit in the law after *Zink*.

Applying the *Zink* test to the facts before us, we reach the same conclusion. Through counsel, Dr. Campbell acknowledges that his interest in the requested

records is a commercial one, to wit, direct mail solicitation.[1] Thus, the nature of his request is unrelated to the fundamental purpose of the Act, to expose public agency action to public scrutiny. Having recognized the existence of a cognizable privacy interest in information such as home address, telephone number and social security number in *Zink*, as well as in 95-ORD-151, we find that the privacy interest of pet owners in Jefferson County in this information outweighs the non-Open Records Act related public interest in disclosure. As the court noted in *Zink*:

> One of our most time-honored rights is the right to be left alone, and we fail to see how an individual who happens to have suffered a work-related injury should have that right disturbed merely because of the injury reporting requirements of Chapter 342.

Zink at 829. Extending this reasoning to the present appeal, we see no reason why an individual who has complied with the licensing requirements of Chapter 258, and local ordinances, should have his "right to be left alone" disturbed where there is no articulable public interest in disclosure. Accordingly, we find that the Department of Animal Control properly denied Dr. Campbell's request.

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[1] Contrary to the Department's assertions, KRS 61.960 et seq. no longer governs access to governmental databases. That act was repealed in 1994, and portions of it incorporated into the existing Open Records Act. As amended, the Open Records Act regulates access to public records, regardless of whether they are stored in an electronic database or in hard copy format.

Ky. Op. Atty. Gen. 95-ORD-153.

With respect to Ms. Love's argument that animal licensure records have been released in the past, we refer her to the discussion found at pages 9 and 10 of 95-ORD-151. Under the bright line test established in *Zink v. Commonwealth*, the courts have now established that those portions of public records containing information in which a person has a cognizable privacy interest may be withheld if there is no public interest in disclosure. Whatever policies may have been observed in the past, we believe that after *Zink* it is clear that a public agency may deny inspection of records containing information of a personal nature if, after weighing the competing public interest, it determines that the latter outweighs the former. When the competing "public" interest is a commercial one, the privacy interest will prevail.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Chris Gorman
Attorney General

Amye B. Majors
Assistant Attorney General

COVER STORY / CRIMINAL JUSTICE

IDENTITY THIEVES

Stealing someone's identity to buy everything from cars to toys and leaving the real person's credit rating in ruins may be the perfect crime because there is little that can be done to prosecute it. Until now.

BY MICHAEL HIGGINS

Michael Higgins, a lawyer, is a reporter for the ABA Journal. *His e-mail address is higginsm@staff.abanet.org.*

Sometime in the early 1990s, a con man named Scott Clinton Gilbert visited a resumé and printing shop in Las Vegas. His bill came to $185.30, and he paid in his usual fashion: He lied.

Gilbert charged his purchase under the name "Robert Hartle." If anyone had questioned Gilbert's true identity, the scam artist was more than ready. He had obtained a "Robert Hartle" driver's license, Social Security card – even a birth certificate.

Gilbert probably didn't think much of that small transaction. Before his fraud spree was done, he would stick the real Robert Hartle with debts of more than $110,000, including bills for three pickup trucks, two motorcycles and a double-wide mobile home.

Gilbert, who later pleaded guilty to related charges, was one of thousands of criminals who quietly discovered what in an increasingly cashless society had become almost the perfect crime: identity theft. By posing as someone else, thieves found, they could steal in a way that left victims powerless and police uninterested.

"It was a very easy crime," says Ed Mierswinsky, a consumer advocate at U.S. Public Interest Research Group in Washington, D.C. "Forget restitution. Consumers couldn't even obtain peace of mind" from seeing the criminals punished.

Today, identity theft is still a vibrant and growing criminal enterprise, but its cover has been blown. Federal officials are holding summits and seminars to alert law enforcement officers to the crime. State legislators are pushing for tougher criminal penalties.

And this fall, Congress is likely to vote on a bill that would make identity theft a federal felony, punishable by up to 15 years in prison. Another bill would give consumers more control over who has access to personal information, such as Social Security numbers.

A '90s Kind of Crime

It's hard to say how widespread identity theft is because there is no standard definition of the crime. But sometime around 1994, the number of complaints to government, business and consumer groups began to explode.

Last year, identity theft cost consumers and financial institutions some $745 million, according to the U.S. Secret Service, which has jurisdiction over many financial crimes. In 1992, about 35,000 people called the credit reporting agency Trans Union with questions or complaints about identity theft, the company reports. Last year, calls numbered more than 523,000.

It is the victims themselves who've dragged the crime into the spotlight, demanding that lawmakers take action.

Among them: an Arizona factory worker who helped initiate the new federal felony bill. He's a man who first learned about identity theft in 1994, when a collection agency called to ask why he hadn't paid his printing bill. He's Robert Hartle.

Hartle, 46, was living with his wife, JoAnn, in Spirit Lake, Iowa, and working as an inspector at a foundry when he was thrust into identity-theft hell. The Hartles had been living frugally, with few bills, and made almost all their purchases in cash.

But when Hartle got the strange call about the Las Vegas printing bill, he ordered a copy of his credit report. It told a different story, Hartle says. To the credit reporting agency and anyone who used its information, Hartle was a free-spending deadbeat.

Luckier than most, Hartle had a lead on the culprit. He knew of a man going by the name of Carl Lee Lunden who had befriended his mother in Phoenix. In fact, "Lunden" – later found to be Gilbert – had persuaded the elderly woman, some 30 years his senior, to marry him, giving him access to Hartle family information. He had also made what Hartle had assumed was a joke about working under Hartle's name.

Hartle traveled to Phoenix to present his case to police. That's where he learned something he found hard to believe. Even if he was right about "Lunden," the police didn't consider Hartle to be the victim of a crime.

The law enforcement logic was this: Hartle wasn't legally obligated to pay any of the bills the impostor had run up. Therefore, Hartle wasn't out any money. If anyone was a victim, it was the bank that issued the credit card.

Never mind that Gilbert had ruined Hartle's credit. Or that the creditors wouldn't erase the debts without a showing of fraud. Hartle found the police wouldn't even allow him to file a police report.

"I offered to give [the detective] the evidence, and he refused to take it," Hartle recalls. "I told him that I was not a lawyer or a police officer, but I knew that crimes had been committed."

By mid-1994, Hartle was in desperate shape. Gilbert had left Hartle's mother and fled Arizona, but hadn't stopped using his name. Hartle was spending $400 a month on phone calls, trying to get creditors off his back and law enforcement onto Gilbert.

"Our credit was ruined. We couldn't move ahead with our lives. Everything was on hold," he says. "We couldn't continue to live like this."

In Hartle's case, the con man he was chasing was crafty. Gilbert had moved to Phoenix from Florida, where he had a criminal record. But identity thieves don't need to be so devious. All that would-be thieves require is a credit card application and some basic personal information about their target.

The key piece of information – the victim's Social Security number – is surprisingly easy to get. It's widely available on credit reports. And it's often the account

number on documents that thieves can steal from their victims' mail or dig out from their garbage.

Lawyers Can Be Victims, Too

Mari Frank, a lawyer in Laguna Niguel, Calif., found out first-hand how easily a scam artist can steal someone's name.

In August 1996, Frank got a call from a bank in Delaware, asking why she hadn't paid an $11,000 balance on a Toys "R" Us credit card. When Frank asked where the bank had been sending the billing statements, she got an address in Ventura, Calif., about 80 miles north of her.

It was Frank's first clue that an identity thief had run up bills of about $50,000 in her name. "She had gotten a red convertible mustang that she was driving around – with my credit," says Frank, now an advocate for tougher identity theft laws. "She got a driver's license with my name."

The thief in Frank's case was anything but sophisticated. She got Frank's credit report by saying she was a private investigator. To get the Toys "R" Us card, Frank says, the woman had simply crossed out her own name on the application and written in "Mari Frank."

Another victim-turned-advocate is Jessica Grant, who also was shocked to find out how unprotected she was. Grant, a pension manager in Sun Prairie, Wis., had always used credit sparingly. But when she and her husband tried to refinance their home in December 1997, they found that an impostor had run up about $60,000 worth of debt in Grant's name.

The thief, who lived in Texas, had opened 19 separate accounts. In some cases, the impostor got credit in Grant's name despite submitting applications with a residence and employer that didn't match Grant's.

"That's the part of it that just infuriates me," Grant says. "There was just so much information that could have been – and should have been – questioned. But it never was."

Dilemma of Enforcement

Like Hartle, both Frank and Grant found that local police did not consider them to be victims of crime. Both took their cases to federal law enforcement – the FBI and U.S. Secret Service – where they found good news and bad.

Federal law does prohibit the fraudulent misuse of identification, bank cards and Social Security numbers 18 U.S.C. 1028, 10 U.S.C. 1028, 42 U.S.C. 408.

But, Frank and Grant both say, federal investigators told them they deal only with multistate fraud rings and cases worth upward of $200,000. Their cases didn't quality.

For the feds, it's a predicament, says James Bauer, a deputy assistant director in the Secret Service and a proponent of tougher identity theft laws. For example, Bauer's office is shutting down a fraud ring in which the thieves used stolen identities to buy cars, then cleverly leveraged their bounty. The thieves would take the car out of state, sell it, use the money to make a down

taken seriously. There [have] to be some identity thieves going to jail and doing some real time."

Jessica Grant says she grew frustrated trying to get the Texas state police to take action. She eventually got help from the Houston Police and an investigator with the Social Security Administration. As of July, the investigator had confronted a suspect and was preparing to file charges, Grant says.

But identity theft itself isn't a crime in Texas. "The law that they're charging her with is the misuse of a Social Security number," Grant says. "She will probably not get jail time."

All three victims paid a stiff price to clean up their credit records. Hartle estimates that he spent about $15,000 out of his own pocket during the ordeal. Grant says she has logged 158 hours, so far, trying to straighten out creditors. Frank, the lawyer, says she cleaned her credit record in eight months. But it took 90 letters, 500 hours and more than $10,000 in out-of-pocket expenses, she says.

Beyond Bad Credit

For some victims, it gets even worse. Impostors have been known to commit crimes, then give their fake identity to police when they're arrested.

"We're hearing more and more cases these days where the identity theft victim is saddled with a criminal record," says Beth Givens, project director at the Privacy Rights Clearinghouse, a San Diego-based group that aids

identity theft victims. "That's what I call the-worst-case scenario."

Some victims may never learn of all the damage that was done, notes Jodie Bernstein, director of the Bureau of Consumer Protection of the Federal Trade Commission.

"If your credit history is destroyed, you may not even know if it went to some potential employer and you didn't get a job," she says. "The victims we talk to eventually get it sorted out, but at great cost."

Bauer of the Secret Service relates another story: "I know a [thief] out West who actually died using the victim's name," he says. The victim "had to get a death certificate undone."

Hartle, Frank and Grant have pushed for reforms that are starting to change how the nation deals with identity theft.

In Arizona, Hartle contacted his state legislator about making identity theft a serious crime that local police couldn't ignore. In July 1996, the state made it a felony – the first law of its kind in the nation.

In California, Frank joined victims testifying last year on behalf of a bill that made identity theft a misdemeanor. As of July, she had testified eight more times in support of other identity theft measures, including one bill that would make it a felony in some circumstances.

Frank, who works primarily as a mediator, also has written a book, *From Victim to Victor: A Step-By-Step Guide for Ending the Nightmare of Identity Theft.* And she has assembled a self-help kit and created a Web site, www.identitytheft.org. to assist victims.

payment on a house, then take out second mortgages on the house.

"Multiply that times the 36 cars that we know about so far, and it amounts to literally millions of dollars." Bauer says.

But while the feds have struggled to crack those sorts of operations. Relatively small fish like Scott Gilbert Have wriggled free.

In theory, the banks that issue the credit cards – the real victims, in the eyes of local police – could push harder for prosecution.

But according to U.S. Sen. Jon Kyle, R-Ariz., sponsor of the new federal identity theft bill, banks often have insurance to cover their losses. And they know their chances of getting any restitution may be slim.

Even if police do investigate, identity [sic] theft cases can be expensive to prosecute, says Donald Grant, A Ventura County, Calif., deputy district attorney whose office handled Frank's case.

Prosecutors have a strong incentive to work a plea deal because trying the case means paying to bring in bank employees as witnesses, as well as bank records from across the country, he says.

They also know judges aren't likely to give jail time to nonviolent criminals, especially if the dollar amount is relatively small or the defendant is a first-time offender.

"To prosecute these cases is a god-awful pain in the neck," Grant says. If there's a trial, "We generate a lot of

expense to taxpayers, and it's not a prison case. It's sort of a no-win situation for the victims," he concedes.

And it's identity theft victims who are left trying to explain all this to creditors and collection agencies, who often suspect the victim of being the impostor. "I was getting outright, flat-out abusive treatment," says victim Grant. "I was in a position where I had to prove who I was, when they never bothered to ask [the thief] to prove who she was."

By the time Hartle and his wife had moved to Phoenix to plead their case with law enforcement officials, Gilbert had fled. In November 1994, state police in New Hampshire picked him up on charges of trying to get a fake driver's license, Hartle says. Out on bail, Gilbert called Hartle and tried to get him to stop his pursuit. When Hartle refused, Gilbert taunted him.

"He told me . . . he wasn't going to quit using my identity until he felt like stopping," Hartle recalls. When Hartle threatened to track down Gilbert himself, "He laughed at me, said, 'Go ahead and try it because nobody's going to convict me.' "

At the time, Hartle recalls, "It was beginning to look like he was right."

But in early 1995, Hartle finally got a break. He had contacted U.S. Sen. Thomas Harkin, D-Iowa, and asked him to press federal prosecutors to help. In February 1995, they indicated Gilbert for buying guns under a false name and misusing a credit card. Gilbert pleaded guilty and was sentenced to 17 months in prison.

But Hartle decided that wasn't enough. He turned to a state representative in Arizona, who pushed state prosecutors to reconsider Hartle's complaints. In October 1995, Gilbert pleaded guilty to perjury in state court and was sentenced to four years in prison.

In total, Gilbert served a little more than three years. Not bad, Hartle says, "when you consider that when I started this, no one was interested."

HOW TO FOIL CREDIT ROBBERS

Key information to guard from identity thieves

- Social Security number
- Maiden names
- Birthdate
- Past addresses
- Driver's license number

How criminals get your data

- Ordering credit reports
- Digging through garbage
- Stealing mail
- Snatching purses
- Learning it from the victim (for example, from resumés or family genealogies posted online)

Prevention tips

- Don't give out your Social Security number unless necessary (i.e., not to merchants who don't really need it)
- Request your credit report regularly

- Shred personal documents before putting them in the trash
- Check W-2 for extra earnings (it could indicate someone else working under your name)

Victim assistance

- Privacy Rights Clearinghouse: (619) 298-3396, www.privacyrights.org
- U.S. Public Interest Research Group: (202) 546-9707, www.pirg.org/uspirg
- Lawyer Mari Frank: (800) 725-0807, www.identitytheft.org

Hard to Pin Down

Despite what their victims go through, it's unusual for an identity thief to get a sentence as severe as Gilbert's.

Take Mari Frank's case. She was fortunate to find a police supervisor in Ventura, himself a victim of identity theft, who ordered an investigation. Police arrested her identity thief in October 1996, Frank says.

But the woman missed her sentencing hearing that December and remained free until police picked her up on other charges in January 1997.

"She finally did a two-month work furlough program . . . staying at a halfway house," Frank says. The thief drove to the program in the red Mustang she had bought with Frank's credit.

"Violent crime does take precedence." Frank says. "I understand that. But the criminals know this is not really

Frank says that because identity theft is so new, some lawyers misadvise clients. She has heard of lawyers counseling victims to change their Social Security number or declare bankruptcy, two strategies she says are counterproductive because they ultimately burden the victim with even more legal difficulties.

Grant, lobbying in Wisconsin, got the quickest legislative action. In February, two months after she discovered she was a victim, Grant was the subject of a front-page article in the *Wisconsin State Journal.*

State Rep. Marlin Schneider, an outspoken privacy hawk, introduced a bill in her name making identity theft a felony there. Grant visited the Wisconsin Capitol and talked to legislators, including one trip in March with a local TV-news camera crew in tow.

The bill passed in April. When Gov. Tommy Thompson signed it into law, Grant got to keep the pen.

And Hartle – four years after his first, confusing phone call about a $185.30 printing bill – hopes that this fall he will become one of the few victim-advocates to push through the same law at both the state and federal levels.

With prodding from Hartle, Kyle, a member of the Senate Judiciary Committee, introduced the Identity Theft and Assumption Deterrence Act last year. The act makes identity theft that crosses state lines a federal felony, punishable by up to 15 years in prison. It also allows restitution to victims.

The larger war over who has control over personal information is one that will be fought well into the next century.

Many issues are just now being identified. The financial and credit industries certainly have their share of political muscle. But don't count out those mistreated by the system – the Hartles, Franks and Grants.

"They have lived through the Orwellian nightmare," consumer advocate Mierswinsky says. "The victims of identity theft are a force to be reckoned with."

VICTIMS WORK TO KEEP PERSONAL DATA PRIVATE

Although they've been the driving force behind identity theft laws in several states, the victims of this scam say what they've accomplished isn't nearly enough. Along with consumer groups, they're pushing for tougher restrictions on how businesses use personal information.

High on their wish list: a bill introduced by U.S. Sen. Dianne Feinstein, D-Calif. that would force businesses to get a person's consent before selling Social Security numbers and other personal data commonly found on credit reports.

Consumer advocates blame banks and credit card companies for issuing pre-approved credit applications and then not screening carefully enough for impostor applicants. They say merchants add to the problem by Hawking "instant credit" cards at the checkout counter.

"The lack of verification at that level is astounding," says Ed Mierswinsky, a consumer advocate at U.S Public Interest Research Group in Washington, D.C.

The credit reporting industry says it, too, is concerned about identity theft. Staffing has been increased on fraud hotlines, and sophisticated software is being put to use to detect spending patterns that may indicate fraud.

Visa suffered $470 million in fraud losses in the United States last year, but only 4 percent was due to identity theft, says Dennis Broson, Visa's vice president of fraud control in McLean, Va. That's down 12 percent from just a few years ago.

But the credit reporting industry opposes restrictions on selling personal information. Officials say the information actually helps prevent identity theft because it makes it easier for banks and merchants to confirm whether people applying for credit are who they say they are. The data also accounts for tens of millions of dollars in annual sales of credit reporting agencies, the U.S. General Accounting Office reported in March. For lenders, there's a tension between serving customers who want tight security and those who bristle at being asked for three pieces of identification for every transaction.

"All we can do is hope that the companies that have this ability to minimize the threat are doing everything they can," says Robert McKew, general counsel for American Financial Services Association, a trade group in Washington, D.C., whose members include many lenders. "I believe that they are."

U.S. Sen. Jon Kyle, R-Ariz., sponsor of a new federal identity theft bill, says he is reluctant to blame lenders.

"They're dealing with a lot of deadbeats, frankly, and everybody has a story," Kyle says. "It's very, very hard in today's world. In order to get credit you've got to give information. And once that information is in the commercial stream, it's very difficult to protect it."

No. 99-200

In The

Supreme Court of the United States

ANN McCLURE, Document Custodian; Gary Rose, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

Petitioners,

v.

STEPHEN AMELKIN, Broadway Chiropractic; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD, doing business as Bogard & Associates,

AND

CITY OF LOUISVILLE, Division of Police; Jefferson County Kentucky; and Class of all police agencies in the Commonwealth of Kentucky; and LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONSE TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED

The Petitioners, the Justice Cabinet and the Attorney General for the Commonwealth of Kentucky, have presented three questions in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. The Respondents, Stephen Amelkin, Brian Christopher Fee, Stuart Lyon, Nicolas Baker, David Kaplan, James W. Chambers, Sidney Hanish, Rhoda Daniels, Kenneth W. Wall, and James Bogard, believe that the first and second questions identified by Petitioners are actually the same issue but that the third question is not ripe for review by this Court. This latter issue concerns Respondents' claim that Petitioners imposed discriminatorily excessive fees in order to prevent Respondents from obtaining copies of motor vehicle accidents so that they could not use the reports to solicit patients or clients. While Respondents prevailed on this claim at the District Court, the Sixth Circuit reversed the District Court's ruling and remanded it to the District Court for specific findings to support the injunctive relief granted. *Amelkin v. McClure*, 168 F.3d 893, 902 (6th Cir. 1999). Accordingly, there is no ruling by the Sixth Circuit on this issue reviewable by this Court.

Additionally, Petitioners' "explanation" of their "questions presented" is an incoherent mish mash of topics which, among other faults, raises an issue not present in this case. Petitioners state that the questions presented "involve irreconcilable conflicts in lower federal and state appellate decisions . . . touching on lower federal appellate decisions concerning the Federal Driver's Protection Act and the Tenth Amendment to the United States Constitution." Petition for Certiorari at

RESPONSE TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED – Continued

pages i-ii (hereafter "Petition at ___"). Petitioners go on to note that this Court "has already granted certiorari in two cases that are similar but not directly on point with the questions presented herein due to the conflicting decisions throughout the United States," *citing Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, 119 S.Ct. 1753, 143 L.Ed.2d 786, 67 U.S.L.W. 3588 (May 17, 1999). *Condon* involved the constitutionality under the Tenth Amendment of the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et seq*. While this Act has been cited by the Petitioners as supportive of the Kentucky General Assembly's reasons for enacting the statute found to be unconstitutional by the Sixth Circuit, its constitutionality under the Tenth Amendment was not challenged by any of the parties in this action and was not addressed by the Sixth Circuit. Nor is the unconstitutionality of the Act pertinent in any way to the Sixth Circuit's determination that the Kentucky statute challenged in this action unconstitutionally infringed upon the First Amendment rights of the Respondents.

RESPONSE TO PETITIONERS' LIST OF PARTIES IN THIS PROCEEDING

Respondents take exception to the five pages of the Petition devoted to its list of "all parties in this proceeding from consolidation of the following cases before the United States District Court." Petitioners have improperly provided to this Court the styles of six different cases, implicitly representing that the parties in each of these cases are parties to this proceeding. In fact, the only persons who are parties to this proceeding are the persons listed in case number 1, identified at page iii of the Petition, and the case identified at page v of the Petition, identifying the parties in two open records cases that had originally been filed with the Kentucky Attorney General, appealed to a Kentucky state court, removed to the United States District Court for the Eastern District of Kentucky, and transferred by that Court to the United States District Court for the Western District of Kentucky, where they were consolidated with this case.

The case identified at page iv of Petitioner's brief (*Northern Kentucky Chiropractic v. Steve Ramey, et al.*) is a separate case from this and was never consolidated with this case. Similarly, the case identified at page vi of the Petition (*Stephen Amelkin, D.C., et al. v. Jefferson County, Kentucky*, Civil Docket No. 95-CV-22), was consolidated with this case but the Defendants in that action did not appeal the Court's ruling to the Sixth Circuit. Accordingly, the ruling in that case is final and the parties thereto are not before this Court.

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RESPONDENTS' STATEMENT OF THE CASE

Respondents are attorneys, chiropractors, and a publisher of a newsletter who originally brought this action to enjoin the enforcement of amendments passed by the Kentucky General Assembly in 1994. The amendments prohibited the disclosure of motor vehicle accident reports to anyone other than parties to the accident, the insurer of any party who was the subject of the report, and the attorneys of the parties. "News-gathering" organizations were allowed access to the reports, but were explicitly prohibited from using them for "a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report." KRS 189.635 Sections (5) and (6). Specifically, KRS 189.635(6) provided that accident reports

> shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

This section of the statute modified section 5, which imposed the limitations noted above.

> All other accident reports required by this section [i.e, accident reports filed by law enforcement officers or agencies], and the information

> contained in the reports shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order, or except pursuant to subsection (6) of this section. These reports shall be available only to the parties to the accident, the parents or guardians of a minor who is a party to the accident, and the insurers of any party who is the subject of the report, or to the attorneys of the parties.

KRS 189.635(5).

Respondents alleged that the amendments were enacted with the intent of preventing them, and others in their position, from using information from motor vehicle accident reports to solicit persons involved in those accidents as potential patients and clients. Evidence submitted by Petitioners at the hearing on Respondents' motion for a permanent injunction substantiated this claim. The Petitioners argued that they had the right to deny access to the motor vehicle accident reports in order to advance the privacy interests of those involved in vehicular accidents. They supported their argument with evidence purporting to demonstrate that solicitation of patients and clients was distasteful. For example, Petitioners submitted the affidavit of the Executive Director of the Kentucky Bar Association in which he stated that he was "aware of numerous citizen complaints and inquiries . . . regarding targeted solicitation of clients by attorneys through the use of mail." Petitioners also submitted as an exhibit a copy of a statute, enacted by the Kentucky General Assembly in 1996, which prohibits attorneys from soliciting clients within 30 days of the occurrence of an event

for which the individual might require legal representation. Additionally, Petitioners submitted a raft of affidavits and letters from individuals who had been involved in motor vehicle accidents, complaining about receiving solicitation letters from attorneys and chiropractors seeking their business.

Finally, Petitioners' *own attorney*, Lucy B. Richardson, who also represents Petitioners in this proceeding, pursued her personal crusade with her affidavit in which she stated her "personal belie[f] that it is a direct infringement upon her family's right of privacy to allow persons to obtain accident reports which reveal personal information, and that to do so violates her constitutional right of privacy and the safety and sanctity of their home. Further, Affiant believes that publicly revealing her home address is unconscionable, unacceptable, and a personal affront to her rights."

Accordingly, Petitioners supported the constitutionality of the challenged statute by arguing that protecting the privacy rights of citizens of the Commonwealth of Kentucky from solicitation by attorneys and chiropractors such as Respondents constituted a reasonable basis for preventing their access to state motor vehicle accident reports. Unfortunately for Petitioners, however, the challenged statute went further than simply allowing access only to the parties to an accident, their insurers, or their attorneys. In addition, the legislation allowed access to the press for purposes of publishing information contained in the reports, but prohibited any "commercial" use of the reports.

Prior to enactment of these amendments, all accident reports filed by law enforcement officers and agencies were not considered confidential and were open records obtainable by any individual under Kentucky's open records law. Kentucky Attorney General Opinion 89-76; Appendix at App. 2.

After reviewing the arguments of Petitioners and Petitioners' evidence which demonstrated that the intent of the statute was to prevent commercial speech, the District Court found the amendments unconstitutional.

> [I]t is obvious that the State of Kentucky is trying to prohibit attorneys and chiropractors from access to a record which has been compiled by the public and which is available to media and insurance companies representing the parties, and which had been previously available to the public. We believe that the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the state asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers.

Memorandum Opinion of District Court; Appendix to Petition at 31-32.

The Sixth Circuit agreed. Rejecting the Petitioners' argument that KRS 189.635 was not unconstitutional because it was a "pure denial of access statute," the Sixth Circuit found that the statute "is not as benign as the defendants would have us believe." *Amelkin*, 168 F.3d at 897. The Sixth Circuit determined that the Section 6 restriction on a " 'news-gathering organization' from using or distributing any accident report that it obtains

for a commercial purpose, other than to publish or broadcast the information in a news report" was a "content-based restriction with respect to news organizations which makes § 189.635 fatally flawed." *Id.* at 897.

Applying this Court's test for analyzing the constitutionality of government regulations limiting commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Sixth Circuit found that the Petitioners' asserted interest in protecting "accident victims' privacy and safety by keeping the personal information contained in such reports out of the hands of the general public," was "substantial, as evidenced by the fact that a number of other courts that have considered similar statutes have reached the same conclusion." *Id.* at 898. However, the Sixth Circuit found that the amended statute did not directly and materially advance that interest in protecting the privacy and safety of accident victims. First, the Sixth Circuit noted that the Petitioners "provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of § 189.635, without any evidence of adverse consequences. . . . This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech." *Id.* at 899, *citing Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995).

The Sixth Circuit found the Petitioners' second argument in support of this statute ("to prevent the direct and unnecessary intrusion into the private lives of accident victims") to be "at least directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions serve to neutralize the government's attempts to protect the privacy of accident victims. . . . The fact that newspapers may inspect and report on the information contained in accident reports belies the defendants' claim that the statute is actually intended to protect the privacy interests of accident victims." *Amelkin*, 168 F.3d at 899. The Sixth Circuit concluded that "the exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest." *Id., citing Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1997). "There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. . . . The exceptions to § 189.635 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*. We therefore conclude that § 189.635(6) fails to satisfy the third prong of *Central Hudson*." *Amelkin*, 168 F.3d at 900.

The Sixth Circuit also addressed Petitioners' claim "that the statutes still advance the interest of protecting the privacy of accident victims because state agencies are required to redact certain personal and private information from any accident report that is provided." *Id.* at 901.

The Sixth Circuit noted that "nothing in this statute . . . requires that state agencies redact such information from accident reports" and that there was nothing in the statutory language of Kentucky's open records law "compelling the custodian of accident reports to redact such personal information before providing the report to news-gathering organizations. That a custodian may choose to do so is obviously not sufficient to cure a constitutional infirmity." *Id.* at 901.

As noted above, Respondents had also lodged an "as applied" challenge to KRS 61.874, which permits state agencies in responding to an open records request to "prescribe a reasonable fee for making copies of non-exempt public records requested for use for non-commercial purposes which shall not exceed the actual cost of reproduction . . . not including the cost of staff required" but may "establish a reasonable fee" for disclosure of public records for commercial purposes which "may be based on one or both of . . . [the] cost to the public agency of media, mechanical processing and staff required to produce a copy of the public record or records; [and the] cost to the public agency of the creation, purchase, or other acquisition of the public records." KRS 61.874(4)(c).

This challenge arose shortly after the District Court first entered an injunction against the enforcement of KRS 189.635. Prior to that time, Petitioners had made copies of motor vehicle accident reports freely available to Respondents with a minimum of bureaucratic hassle at the state police posts where the traffic accident reports were originally filed. The state charged 10¢ per page for the reports, most of which contained one or two pages and almost none of which contained more than four pages. Within

days of the injunction being entered, Petitioners increased the cost of the reports from 10¢ per page to $40.00 per report for non-injury accidents; $90.00 per report for injury accidents; and $230.00 per report for fatal accident reports. With this cost change, Petitioners proposed to charge Respondent Lyon $17,650.00 for copies of two weeks of reports, which previously would have cost him about $68.00. *Amelkin*, 168 F.3d at 902.

Respondents had moved the District Court for summary judgment on this claim. Petitioners did not respond to the motion, nor did they present any evidence at the hearing on Respondents' motion for preliminary and permanent injunctions. The District Court did not specifically address the argument, but in its judgment it enjoined the Petitioners from enforcing the 1994 amendments to KRS 61.874 on which the Petitioners had relied in imposing the exorbitant costs. Appendix to Petition at 33. The Sixth Circuit held that "without the benefit of . . . factual findings" on this issue, "it is impossible for us to judge the validity of the Plaintiffs' arguments. . . . Accordingly, we vacate and remand the case back to the district court to make findings of fact and conclusions of law with regard to how § 61.874 has been applied by the state agency." *Id.* The Sixth Circuit suggested that on remand the District Court

> particularly focus on the 'creation' language in § 61.874(4)(c)(2). The agency could potentially be using this language to charge commercial users not only for the compilation, storage, and upkeep of such records by the agency itself, but also for the state's investigative and personnel costs that went into 'creating' the record. In other words, the agency might be utilizing the

> 'creation' language as a basis to charge more than the agency's marginal or even average cost in producing the records. Instead, the agency might be using this language to recoup the state's costs for law enforcement's investigation that backs up to the creation of accident reports. Any such interpretation of the statute might well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied.

Id.

ARGUMENT

I. Petitioners have not stated any compelling reason for this Court to review the decision below inasmuch as the decision does not conflict with the decision of another United States Court of Appeals regarding access to public records.

Petitioners attempt to fit within Supreme Court Rule 10 by identifying as a compelling reason for the Court to exercise its judicial discretion in granting a petition for a writ of certiorari that "the Sixth Circuit Court of Appeals' decision conflicts with its own decisions as well as the decisions of this United States Supreme Court." Petition at 14. Petitioners cite in support of this argument the cases of *Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984), and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), for the principle that "there is no constitutional right by the press or public to access government records." Petition at 14-15.

The issue of whether there is a blanket right of access to public records does not constitute a compelling reason for this Court to grant the Petition, however, because it was not an issue in this case and the Sixth Circuit did not issue a decision inconsistent with this principle. Indeed, the Sixth Circuit acknowledged the *Heights Community* and *Houchins* principle that local government *can* prevent public access to its records in order to protect the privacy of its citizenry. The Sixth Circuit recognized, however, that the issue presented in this case went further than a mere denial of access to public records, pointing out that the statute in issue "is not as benign as the defendants would have us believe." *Amelkin*, 168 F.3d at 897.

The Sixth Circuit did not strike down KRS 189.635 because the statute denied Respondents access to public records. The Sixth Circuit struck down the statute because it denies access to persons in the position of Respondents in order to prevent commercial speech. After all, the statute expressly prohibits the press from using the reports for a "commercial purpose." The Court found that this circumstance materially differentiates the statute from the "pure access" cases relied upon by the Petitioners.

Further underlying the Sixth Circuit's rejection of Petitioners' argument that KRS 189.635 does no more than regulate access to government records to protect the privacy interests of persons offended by the disclosure of information contained in those records was the statute's internal inconsistency in allowing access to the press "for the purpose of publishing or broadcasting the news." KRS 189.635(6). Accordingly, while the Sixth Circuit acknowledged that "the government's asserted interest in

protecting the privacy and safety of accident victims is substantial and, hence, meets the second prong of the *Central Hudson* four-part test to analyze the constitutionality of government regulations limiting commercial speech," the statute failed to advance "the government's interest 'in a direct and material way.' " *Amelkin*, 168 F.3d at 899, *quoting Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995).

As the Sixth Circuit noted, it is here that the Petitioners' simplistic analysis falls apart. If the interest sought to be protected is the interest of an individual in not having private information contained in motor vehicle accident reports disclosed to anyone other than his insurer or attorney, then why would the statute allow the information to be disclosed to the press, which has no need directly pertinent to that individual to know such information and whose only reason for obtaining it is to further disclose it to the world at large. "The exception to § 189.635(5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest. . . . There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public." *Amelkin*, 168 F.3d at 900. Accordingly, "the exceptions to § 189.635(6) 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing*." *Id.*

Similarly, the Sixth Circuit rejected the argument made here that, because the statute on its face does not place restrictions on how information obtained from the

government can be used, but merely prohibits the access to the information in the first place, it did not impact on the First Amendment rights of the Respondents. Petition at 22. After all, "subsection 6 of § 189.635 clearly restricts 'news-gathering organizations' from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report. It is this content-based restriction with respect to news organizations which makes § 189.635 fatally flawed." *Id.* at 897.

Accordingly, Petitioners' argument that the Sixth Circuit's decision conflicts with decisions of this Court and other courts on access to government records is incorrect. The Sixth Circuit clearly distinguished the issues presented in this case from pure public access cases and no such inconsistency can be relied upon as a compelling reason for this Court to grant the Petition.

II. The Sixth Circuit's decision does not conflict with decisions of the Kentucky Supreme Court or its open records laws.

In reaching for a cert-worthy issue, Petitioners further argue that the decision below "has caused a conflict between its decision and Kentucky's Appellate Courts interpreting Kentucky's open records laws regarding privacy." Petition at 22. There is, however, no Kentucky Supreme Court case cited by Petitioners as being in conflict with the Sixth Circuit's decision. The only proceedings relied upon are a case decided by the Kentucky Court of Appeals, which is not a state court of last resort, and opinions of the Kentucky Attorney General, which

have even less authority. See Petition at page 13. Moreover, the cases and Attorney General opinions cited by Petitioners refer not to the statute in issue here, but to Kentucky's open records law enacted at KRS 61.878.

Whether or not the statute in issue here violates the First Amendment rights of the Respondents is not affected by interpretations of a completely different statute.

Petitioners argue that Kentucky's open records laws will also prevent Respondents from accessing these reports and conclude that this fact either renders the Sixth Circuit's decision "moot" or, alternatively, requires Kentucky agencies to act contrary to Kentucky law. These arguments set logic on its head without presenting an issue worthy of review. If, for instance, Petitioners can lawfully deny Respondents access to these reports without the aid of an unconstitutional law, then one wonders why they seek so assiduously to argue for its constitutionality.

Moreover, the invalidation of this statute does not by implication invalidate any other statute. Accordingly, the absence of this statute will not compel the violation of the open records laws. Finally, if the privacy interest of Kentucky citizens is, in fact, foremost in the thoughts of the Petitioners, it is also unclear why they do not urge amendment of the statute to excise that portion of it which renders it unconstitutional, i.e., the provision that allows the press access to the reports but prohibits the press from using the information contained in them for a "commercial purpose."

Finally, contrary to Petitioners' argument, neither the Driver's Protection Act nor Kentucky's adoption of

regulations pursuant to that Act are implicated by the Sixth Circuit's decision. First, the constitutionality of the Federal Act was not challenged by Respondents in this case. Accordingly, the issue before this Court on a petition for certiorari granted in *Condon v. Reno, supra,* is not present in this case.

Moreover, neither the provisions of the Act nor the regulations adopted by the Kentucky Department of Vehicle Regulations to implement the Act conflict with the Sixth Circuit's decision in this case. First, the Federal Act does not prohibit disclosure of the accident reports in issue here inasmuch as the Act allows as a "permissible use" of motor vehicle records the disclosure of "personal information" "for bulk distribution for surveys, marketing, or solicitations. . . . " 18 U.S.C. § 2721(b)(12). The Kentucky regulations implementing the Act also allow "the selling of information from the Automated Vehicle Information System relating to a motor vehicle registered or titled in the Commonwealth of Kentucky . . . if the information is to be used, rented, or sold solely for bulk distribution for surveys, marketing, or solicitations." 601 KAR 2:020E § 5(1). Moreover, Kentucky's regulation implementing the Federal Act expressly provides that "a motor vehicle accident report" "shall not be considered private information." 601 KAR 2:020E § 2(1)(a).

Kentucky law allows expressly for both the disclosure and the sale of the motor vehicle accident reports in issue here. Accordingly, there is no conflict between the Sixth Circuit's opinion in this case and Kentucky or federal law on the disclosure or sale of motor vehicle accident reports.

III. The issues decided in *Los Angeles Police Department v. United Reporting Publishing Corp.* are sufficiently dissimilar to those in the instant case that this Court's grant of certiorari in that case should not affect its consideration of the Petition in this case.

Petitioners argue that the grant of the petition for a writ of certiorari in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 146 F.3d 1133 (9th Cir. 1998), *cert. granted*, 119 S.Ct. 901, 142 L.Ed.2d 901, ___ U.S. ___ (January 25, 1999), is both similar to this case in that it involves an open records issue, but also dissimilar in that it does not address "a constitutional right to access government records" or "a distinction of access . . . for access by parties involved in the accident and news media; . . . " Petition at 37. Where allegedly similar, Petitioners appear to argue that the Ninth Circuit's decision represents a split in the circuit courts of appeal; where dissimilar, Petitioners appear to argue that the grant of certiorari will not resolve issues in this case. Neither assertion is valid.

First, the statute in *United Reporting* and the state legislative background against which the statute was evaluated are so dissimilar to this case that the "open records" issue resolved there would not resolve the issues here. In *United Reporting Publishing* the statute in issue allowed access to criminal records but prohibited the information obtained from being used to sell services. *United Reporting Publishing*, 146 F.3d at 1135. In this case, the records in issue are motor vehicle accident reports to which Respondent attorneys and chiropractors are denied

access and Respondent publisher is allowed access but prohibited from using for a "commercial purpose."

The legislative background that differentiates these circumstances is the Federal Driver's Protection Act and Kentucky's regulations implementing them. As discussed in section II above, the Driver's Protection Act would allow access to these records and their use for the very purposes intended by the Respondents, as would the Kentucky regulations implementing that Act.

Although the underlying rationale for invalidating the California statute was similar to the rationale employed by the Sixth Circuit in this case, since the Federal Act and Kentucky regulations, as well as pre-existing Kentucky Attorney General opinions, would all allow access to the records in issue here against any argument of privacy rights, resolution of the issues raised in *United Reporting Publishing* would not compel a different result in this case.

Moreover, as discussed in section I above, neither this case nor *United Reporting Publishing* addressed the issue of whether there "is a constitutional right to access government records." Both cases involve prohibitions on the use of government records for commercial speech purposes – a distinction Petitioners persist in disregarding. Since neither case involves a pure access issue, the grant of certiorari in either case would not resolve the issue and it does not constitute a compelling reason for granting the Petition in this case.

IV. Since the Sixth Circuit vacated the District Court's judgment on the unreasonable fee issue and remanded that claim to the District Court for findings of fact and conclusions of law in order to enable the Sixth Circuit to judge the validity of Respondents' arguments, it would be inappropriate for this Court at this point to exercise its discretionary jurisdiction to review the claim.

This Court's certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . and except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). In fact, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id.*

For that reason, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), this Court denied the petition for writ of certiorari to the Fourth Circuit Court of Appeals on its order vacating the judgment of the District Court and remanding to that court for the determination of an appropriate remedy. The Fourth Circuit had "expressly declined to rule on the 'specific remedial course that the Commonwealth should or must follow hereafter, and suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current admissions policy." *Id.* The reason for denying the petition was the Court's observation that it "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Id.* The Court believed "it prudent to take that course here," noting that denial of

the petition at that juncture would "not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered." *Id.* Indeed, the subsequent petition for certiorari was, in fact, granted after the remand to the District Court and subsequent final decision of the Fourth Circuit.

In *Brotherhood of Locomotive and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967), this Court relied on the same rationale in denying the petition for a writ of certiorari to the District of Columbia Circuit Court, which had remanded to the district court "to consider whether there had in fact been a contempt [of the district court's order forbidding a strike], and, also, if there was a contempt, whether it was 'of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey.' " *Id.* at 328. There the petition was denied because the Court of Appeals' remand of the case rendered it "not yet ripe for review by this Court." *Id.*

The same is true here with respect to the unreasonable fee issue. As the Sixth Circuit observed, Respondents had "contend[ed] that the agency responsible for implementing [KRS] 61.874 [had] applied the 'reasonable fee' provision" of the statute "in an arbitrary and discriminatory manner insofar as commercial users are concerned." *Amelkin*, 168 F.3d at 901. The district court had enjoined enforcement of the statute without making specific findings regarding the factors to be considered in deciding whether to grant a preliminary injunction. The Sixth Circuit believed that "without the benefit of such factual findings, it is impossible for us to judge the validity of the Plaintiffs' arguments." *Id.* at 902.

The Sixth Circuit vacated and remanded the case "back to the district court to make findings of fact and conclusions of law with regard to how § 61.874 has been applied by the state agency" and suggested the particular area in which the court believed such findings would need to be made in order for it to review whatever judgment the district court would ultimately issue. *Id.* The Sixth Circuit did not utter any judgment regarding the validity or invalidity of the Respondent's arguments, finding that it could not do so until findings were made on whether the Petitioners were using the "creation" language in § 61.874(4)(c)(2) "to charge commercial users not only for the compilation, storage, and upkeep of such records by the agency itself, but also for the state's investigative and personnel costs that went into 'creating' the record," noting that "the agency might be using this language to recoup the state's costs for law enforcement's investigation that backs up to the interpretation of accident reports." *Id.* The Sixth Circuit observed, but did not decide, that "any such interpretation of the statute **might** well be an arbitrary and capricious application sufficient to demonstrate that it is unconstitutional as applied." *Id.* (emphasis added).

Accordingly, the Sixth Circuit did not render a final decision on the Respondent's claim that the fees charged by Petitioners for copies of accident reports constitute an arbitrary and discriminatory tax on Respondents' exercise of commercial speech rights. As a result, this issue is not in a posture that it would be reasonable for this Court to exercise its discretion to review. There has not been a final determination that Petitioners' conduct with respect

to whether the imposition of these fees violates the constitutional rights of the Respondents. In the absence of such a determination, there is no reviewable judgment and the Petition on this issue should be denied.

CONCLUSION

The petition for writ of certiorari to the Sixth Circuit for the Court of Appeals should be denied.

Respectfully submitted,

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APPENDIX

1988-1991 Ky. Op. Atty. Gen. 2-251, Ky. OAG 89-76, 1989 WL 434328 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

OAG 89-76
October 19, 1989

Open Records Appeal
File Identification No. 89-882
Jeffrey D. Thompson

Mr. Walter L. Cato, Jr.
510 Starks Building
Louisville, KY 40202

Dear Mr. Cato:

Mr. Jeffrey D. Thompson has appealed to the Attorney General pursuant to KRS 61.880 your denial of his request to inspect all automobile accident reports prepared by the Shively Police Department during the four week period prior to the date of inspection.

Mr. Thompson requested the opportunity to inspect said documents by letter dated May 24, 1989. In this letter, Mr. Thompson indicated that he anticipated making future requests on a weekly basis. You denied this request by letter dated June 1, 1989. As reasons for this denial, you attached your response to an identical request. That response, dated March 14, 1989, relied upon the exemption of KRS 61.878(1)(a). This response also based the denial of inspection on KRS 61.872(2) which provides that the official custodian may require written application describing the records to be inspected. Finally, this response based the denial on KRS 61.872(5)

which pertains to requests which place an unreasonable burden on the public agency.

Mr. Thompson requested the Attorney General to review this denial by letter dated June 2, 1989. Mr. Thompson referred this office to OAG 83-53 in support of his claim that the records requested are subject to inspection.

OPINION OF THE ATTORNEY GENERAL

This office has repeatedly and consistently held that uniform police traffic accident reports prepared by law enforcement officers pursuant to KRS 189.635 are not confidential and are open records under the open records law. OAG's 83-53, 80-210, 76-478. [Copies enclosed.] This office reaffirms its prior opinions on this subject and holds that the records sought for inspection by Mr. Thompson are not exempt under the provisions cited in your letter of denial and must be made available.

KRS 61.878(1)(a) provides in part as follows:

> The following public records are excluded from the application of KRS 61.870 to 61.884. . . . (a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

Your letter relied in part upon KRS 61.878(1)(a) in denying Mr. Thompson's request. Specifically, your letter states that some of the information included on accident reports, such as driver's license numbers which are identical with social security numbers, and names and addresses of parties and witnesses would constitute an

invasion of personal privacy if disclosed. It is true that social security numbers are exempt from public inspection under the provisions of KRS 61.878(1)(a). OAG 84-51. This office does not agree, however, that the names of parties and witnesses are excluded from public inspection. OAG 82-234. However, the fact that some information contained in police accident reports may be exempted from public inspection does not relieve the public agency of providing the other information which is not exempted from public inspection. KRS 61.878(4) provides as follows:

> If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the non-excepted material available for examination.

Therefore, a public agency may blot out or expunge information which is excluded from public inspection and make the non-excepted material available for inspection. The task of separating excepted material from non-excepted material on voluminous numbers of police accident reports is admittedly burdensome. However, the decision to do so rests within the sound discretion of the public agency because the exemptions contained within KRS 61.878(1) are permissive, not mandatory. OAG's 84-163, 83-329, 82-275, 80-519, 79-275. Therefore, the Shively Police Department may make available all information contained on uniform police traffic accident reports or may expunge that information which is exempt from inspection, but may not deny inspection of the entire report.

Your letter of denial was also based in part upon KRS 61.872(2) which provides as follows:

> Any person shall have the right to inspect public records during the regular office hours of the public agency. The official custodian may require written application describing the records to be inspected.

Your denial letter appears to maintain that the written letter by Mr. Thompson, although sufficient for purposes of satisfying the requirement of a "written application," does not sufficiently describe the records to be inspected. This office disagrees. Mr. Thompson's letter expressly requests that he be permitted to inspect "all accident reports prepared for a period of four (4) weeks prior to the date of inspection." The letter attached to your letter of denial indicates that approximately 50 accident reports per week are prepared. Therefore, Mr. Thompson is requesting to inspect approximately 200 accident reports and has identified without any ambiguity which accident reports he wishes to inspect. The public agency may designate the place, time, and date on which the public records will be available for inspection and therefore there should be no doubt about which records Mr. Thompson wishes to inspect. KRS 61.872(4).

The third reason given for denial of Mr. Thompson's request is based upon KRS 61.872(5) which provides as follows:

> If the application places an unreasonable burden in producing voluminous public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential

> functions of the public agency, the official custodian may refuse to permit inspection of the public records. However, refusal under this section must be sustained by clear and convincing evidence.

[Emphasis added.]

This office does not believe that you have provided clear and convincing evidence that Mr. Thompson's request places an unreasonable burden on the Shively Police Department or that Mr. Thompson's request is intended to disrupt essential functions of the department. The Shively Police Department is not required to review voluminous numbers of reports and make selected copies of them for Mr. Thompson. Mr. Thompson may be shown where the reports are filed and review the reports himself. This procedure should not prove to be unreasonably burdensome.

The March 14, 1989, letter attached to your letter of denial indicates that the Shively Police Department has the following policy:

> To provide copies of individual police reports to attorneys who advise that they represent one of the parties involved or a witness to the accident and who can identify the report by name of party and date or approximate date. Report copies are also to be provided to individuals who are involved in an accident or witnesses thereto.

This policy reflects a practice of providing public records to certain persons and denying the same records to other persons. This policy is in violation of the open records law. The exemptions of KRS 61.878(1) may be

invoked according to the nature of the record, but not according to the person who is requesting the inspection or the stated or suspected purpose of the inspection. OAG 82-233. In the future, the Shively Police Department should refrain from permitting inspection of public records by some individuals and denying inspection of the same public records to other individuals.

It is the opinion of the Attorney General that the records sought for inspection by Mr. Thompson are not exempt under the provisions cited in your letter of denial and must be made available. The Shively Police Department may exercise its prerogative to delete exempted material contained in the police accident reports, provided there is consistent application of this prerogative without regard to the individual requesting inspection. The Shively Police Department may institute proceedings within 30 days injunctive or declaratory relief in the circuit court of the district where the public records are maintained pursuant to KRS 61.880(5).

Sincerely,

Frederic J. Cowan
Attorney General

William B. Pettus
Assistant Attorney General